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No. 2400

**In the United States Circuit Court
of Appeals**

NINTH CIRCUIT

October Term, 1913

Oregon and California Railroad
Company, et al.,

Defendants and Appellants

John L. Snyder, et. al.,

Cross-Complainants and Appellants

William F. Slaughter, et al.,

Interveners and Appellants

v.

The United States

Appellee

Appeal from the District Court of the United States for Oregon

Brief for the United States

FILED

MAY 27 1914

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No. 2400

IN THE UNITED STATES CIRCUIT
COURT OF APPEALS
NINTH CIRCUIT

October Term, 1913

OREGON AND CALIFORNIA RAIL-
ROAD COMPANY, ET AL.,

Defendants and Appellants,

JOHN L. SNYDER, ET AL.,

Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, ET AL.,

Interveners and Appellants,

v.

THE UNITED STATES,

Appellee.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR OREGON.

Brief for the United States

ORDER—This brief is arranged under two chief heads: The Statement of the Case, which embraces (a) an outline of the pleadings, orders of court and the decree, (b) the established facts and (c) the dis-

FOREWORD

puted facts; The Argument, which is divided into seven principal parts, subdivided into appropriate topics. The scheme of the brief, setting forth each subject considered, is exposed in the index (Ante. p. I).

STATEMENT OF THE CASE.

FOREWORD.

This is an appeal from a decision of the United States District Court for Oregon. The suit was brought in equity by the United States under the joint resolution of Congress approved April 30, 1908, to have it judicially determined that about 2,300,000 acres of granted lands, in Oregon, had been forfeited by the grantees, and their successors, through breaches of certain conditions subsequent in the grant under which they had received the lands from the Government.

The defendant Oregon and California Railroad Company is an Oregon corporation and claims to be the absolute owner of the lands in dispute. The defendant Southern Pacific Company is a Kentucky corporation; it owns all of the stock, guarantees \$17,745,000 outstanding bonds, and leases and operates the railroad and telegraph line of the Oregon and California Railroad Company. The defendant, Stephen T. Gage, is a resident and citizen of California, and is the surviving trustee in a deed of trust securing the preferred stock of the Oregon and

FOREWORD

California Railroad Company. And the defendant Union Trust Company, a New York corporation, is the trustee under a mortgage given by the Oregon and California Railroad Company to secure the \$17,745,000 of bonds just referred to.

The cross-complainants claim to be actual settlers upon some of the land in question and to have thereby acquired some right to the lands settled upon.

The interveners assert that they have offered to comply with all the conditions necessary to entitle them to certain of said lands and in consequence have a claim thereto.

It was stipulated that but one cross-complaint and one petition in intervention should be printed in the record and that each should be treated as typical of all others of its class. (Stip. Vol. XVI 8655.)

Vols. I-III, inclusive, of the printed record contain the pleadings, rulings of the court and the decree; Vols. IV-XIV, inclusive, the stipulation of fact, testimony offered in chief by complainant, testimony offered in chief by defendants, except Exhibit 399, and testimony offered by complainant in rebuttal; Vols. XV-XVI, inclusive, defendants' Exhibit 399, certain other exhibits, assignments of error, bond, citation and other papers with reference to the appeal; Vol. XVII, an index of the record, and Vol. XVIII, defendants' photographic exhibits.

THE BILL SUMMARIZED.

After stating the names of the defendants, their residences and citizenship, the bill proceeds in substance as follows:

On July 25, 1866, Congress passed an act

granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon.

The act is set out in the bill. We give the substance of such parts as we deem pertinent at this time.

Sec. 1. The California and Oregon Railroad Company, a California corporation, and

Such company organized under the laws of Oregon as the Legislature of said state shall hereafter designate.

are authorized and empowered to locate, construct and maintain a railroad and telegraph line between the City of Portland, Oregon, and the Central Pacific Railroad in California; the California and Oregon Company to construct that part of the road and telegraph line within the State of California and the Oregon Company to construct that part of it within the State of Oregon.

THE BILL SUMMARIZED

Sec. 2. Grants certain lands in Oregon and California to aid in the construction of the railroad and telegraph line between the points named.

Sec. 3. Gives the right of way over the public lands.

Sec. 4. Provides that whenever the said companies, or either of them, shall have 20 miles of road and telegraph line ready for service, the President shall appoint three commissioners to examine the same, and if it shall appear that 20 consecutive miles have been completed and equipped, the commissioners shall so report to the President and thereupon patents shall issue to the companies for the lands earned.

Sec. 5. The grant is made upon condition that the companies shall keep the railroad and telegraph in repair and use, and shall transport the mails and transmit dispatches for the Government when required at fair and reasonable rates; also that all property or troops of the United States shall be transported at the cost of the corporations, when required by the Government.

Sec. 6. Provides:

That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty

THE BILL SUMMARIZED

miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five.

Sec. 8:

That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be * * * shall revert to the United States.

Sec. 10. That all mineral lands are excepted from the operation of the act, save where they contain timber; in such case the timber may be removed to aid in the construction of the road.

Sec. 12:

That Congress may at any time, having due regard for the rights of said Oregon and California Railroad companies, add to, alter, repeal or amend this act.

On October 6, 1866, the bill says certain persons organized, under the laws of Oregon, a corporation

THE BILL SUMMARIZED

bearing the name "Oregon Central Railroad Company," with its principal place of business at Portland, and two days later the Legislature of Oregon designated it as the corporation entitled to receive the grant. Soon thereafter this company, for the purpose of availing itself of the grant, projected a line from Portland in a westerly direction to Forest Grove and thence southerly to McMinnville on the westerly side of the Willamette River, from which circumstance it became known as the "West Side Company" and its projected road as the "West Side Road," and they are so referred to throughout the bill.

May 25, 1867, it is averred the company adopted a resolution assenting to the provisions of the act of Congress, and on July 6 of the same year filed the assent, together with a copy of its articles of incorporation and of the resolution of designation by the Legislature in the office of the Secretary of the Interior, and on August 20, 1868, filed in the same office a general map of survey of its proposed line of road.

In April, 1867, it is alleged, certain residents of Oregon, contending that the West Side Company had never been lawfully incorporated, and designing to secure the benefits of the Congressional grant, attempted to organize, under the laws of Oregon, another corporation bearing the name "Oregon Cen-

THE BILL SUMMARIZED

tral Railroad Company," with its principal place of business at *Salem*, Oregon. This company projected its line of road on the easterly side of the Willamette River, and became known as the "East Side Company," and its road as the "East Side Road" to distinguish it from the other company of the same name, whose line, as we have just seen, was projected on the west side of the Willamette River.

The West Side Company, it is charged, having failed to finish its first 20 miles within the time provided by the act of 1866, applied to Congress for an extension of time and, on July 25, 1868, Congress granted it by amending section six of the act so as to give the company eighteen months from the passage of the new act for the completion of the first 20 miles and enlarging the time for finishing the road from 1875 to 1880.

The bill then says that the East Side Company, in furtherance of its promoters' design, on October 20, 1868, procured the adoption of a resolution by the Legislature of Oregon, which, in substance, substituted the East Side Company for the West Side Company. Thereupon a controversy arose between the two companies as to which was entitled to the grant. The East Side Company, realizing that the year had expired within which assent to the provisions of the act of 1866 must be filed, applied to Congress in 1868 for an extension of time and simul-

THE BILL SUMMARIZED

taneously laid before Congress the joint resolution of the Legislature of Oregon designating it as the corporation to receive the grant, and averred that if the time for filing the assent was not extended the benefits of the grant would be wholly lost to the State of Oregon.

The West Side Company, it is asserted, opposed the application and contended that the grant had become vested in it. Congress granted an extension by passing the amendatory act of April 10, 1869, which amended section six of the act of 1866, and said among other things:

And provided further, that the lands granted by the act aforesaid shall be sold to *actual* settlers only, in quantities *not* greater than *one-quarter* section to *one* purchaser, and for a price *not* exceeding *two dollars and fifty cents* per acre.

The East Side Company, through its directors, on June 8, 1869, adopted a resolution which, after reciting that it had been designated by the Legislature of Oregon to receive the grant, declared that it accepted

all the provisions, rights, privileges and franchises of said act of July 25, A. D. 1866,
* * * and of *all* acts *amendatory* thereof, and upon the conditions therein specified, and do

THE BILL SUMMARIZED

hereby give our assent and the assent of such company thereto.

The company filed a copy of this resolution in the office of the Secretary of the Interior June 30, 1869, and in October of the same year filed in the same office a map of survey and location of 70 miles of its projected line.

It is further averred that the right of the East Side Company to use the name "Oregon Central Railroad Company" having become involved in litigation, the stockholders of that company in March, 1870, organized the defendant Oregon and California Railroad Company, under the laws of Oregon, and in the articles of incorporation stated that the principal object of the corporation was to become the successor of the East Side Company, and to receive and exercise the grants, franchises and privileges given by the act of 1866 and the acts *amendatory* thereof. Accordingly on March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company an instrument, purporting to assign, transfer and convey to it all the property of the East Side Company, including its right to the grant made by the act of July 25, 1866, and acts *amendatory* thereof. The bill charges that the purpose and intent of this instrument was not to operate as a sale of the lands granted, but to constitute the Oregon and California

THE BILL SUMMARIZED

Railroad Company the successor of the East Side Company.

In April of the same year the East Side Company was dissolved, and the Oregon and California Railroad Company, through its board of directors, adopted a resolution declaring:

That this company do accept the grant conferred by such act of Congress (meaning the act of 1866), and all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified.

And directing the president and secretary

to file the assent of this company to such Act of Congress and *amendments* thereto, as aforesaid, in the office of the Secretary of the Interior.

It also directed that the same officers should file in the same office a copy of the deed of assignment just mentioned. The assent, resolution and deed were filed as directed on the 28th day of the same month.

The bill then alleges that the West Side Company failed to complete construction of any part of its line, abandoned all claim to the grant of 1866, acquiesced in the substitution of the East Side Company, and applied to Congress for another grant in lieu of the one abandoned. In response to this Con-

THE BILL SUMMARIZED

gress passed the act of May 4, 1870, granting certain lands to the West Side Company,

for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon.

This act has in it provisions similar to the one of 1866, requiring the filing of an assent with the Secretary of the Interior within one year from the time of its passage, and provided that the lands granted

Shall be sold by the company only to *actual* settlers, in quantities *not* exceeding *one hundred and sixty* acres or a quarter section to any *one* settler, and at prices *not* exceeding *two dollars and fifty cents* per acre.

The West Side Company filed its assent to this act on July 20, 1870.

In that year the owners of a majority of the stock of the Oregon and California Railroad Company purchased all the stock of the West Side Company and thereafter the two companies were conducted as one until the West Side Company was dissolved in 1880.

THE BILL SUMMARIZED

The bill then recites the progress of the work on both lines and the financial difficulties of the companies during the next decade. It is stated in this connection that the Oregon and California Railroad Company, between 1870 and 1873, constructed 197 miles and the West Side Company 47 miles of their respective roads. Work was then suspended, not to be resumed on the East Side line until 1881, and never on the West Side line.

It is then averred that in 1881 all of the former stock of the Oregon and California Railroad Company was cancelled, because nothing had ever been paid for it, and new stock was issued in the sum of \$19,000,000; \$12,000,000 preferred and \$7,000,000 common; that this stock is still outstanding; that it was used to pay in part the existing indebtedness of the company; that in June, 1881, the company delivered to certain trustees an instrument in writing purporting to convey to them the lands of both grants as security for payment of the *preferred* stock; that this trust deed purports to authorize the trustees and their successors to sell and convey the lands covered by it in violation of the terms of the grant; and that afterwards Stephen T. Gage became the sole trustee under this deed.

The bill further alleges that two issues of bonds were negotiated, one on June 1, 1881, and another on May 26, 1883, known as "First Mortgage Bonds"

THE BILL SUMMARIZED

and "Second Mortgage Bonds," respectively; that through these bonds the Oregon and California Railroad Company procured funds aggregating \$5,000,000 and at once resumed the work of construction on the East Side line and continued until 1884, when its funds having become again exhausted the construction was abandoned and not resumed until 1887.

It is stated that default having occurred in the payment of interest on the aforementioned bonds, suit was brought in the United States Court for Oregon and the property of the company placed in the hands of a receiver; that in May, 1887, during the pendency of the receivership, the Southern Pacific Company acquired control of the Oregon and California Railroad Company; and the many transactions through which this was accomplished are set out in detail.

It is charged that in 1887 the Southern Pacific Company leased from the Oregon and California Railroad Company its road and telegraph lines, and other property, for a term of 40 years; that this lease remained in effect until about 1893, when a new lease was made for a term of 34 years, which is still in force; and that pursuant to this lease the Southern Pacific Company has operated the railroad and telegraph lines ever since; it is also stated,

THE BILL SUMMARIZED

in this regard, that in 1901 the Southern Pacific Company became the owner of all the capital stock of the Oregon and California Railroad Company and is now, and ever since has been, the owner thereof; that through this ownership it has controlled, and still controls, the management of that company.

The bill further avers that after the Southern Pacific Company secured control of the Oregon and California Railroad Company it, on July 1, 1887, caused the latter company to make and deliver to the Union Trust Company a trust deed covering substantially all its property, including the land grants, to secure bonds in the sum of \$20,000,000 to be subsequently issued; that these bonds were issued, were guaranteed by the Southern Pacific Company, and their sale negotiated and consummated by that company; that the proceeds of these bonds came under the control of the Southern Pacific Company and were used by it to purchase securities of the Oregon and California Railroad Company to complete the construction of the latter company's road and, in consequence, the bonds represent an indebtedness of the Southern Pacific Company; that the deed to the Union Trust Company, just mentioned, purports to authorize that company, and its successors, to sell and convey the lands described therein in violation of the terms of the grants.

THE BILL SUMMARIZED

It is then stated that the receivership proceedings, heretofore referred to, were dismissed in June, 1888, and the first and second mortgage bonds, excepting those secured by the trust deed of July 1 to the Union Trust Company, together with all mortgages and trust deeds securing them, were discharged.

The bill also alleges that the Southern Pacific Company, through its land department, in 1888 took control of the sale of the granted lands; that a large force of timber cruisers and land examiners were sent out to examine and appraise the lands; that the prices as to at least eighty per cent thereof were fixed at a sum greatly in excess of \$2.50 per acre; and that for the purpose of evading responsibility for the contemplated violation of the terms of the grant the Southern Pacific Company, Oregon and California Railroad Company and Union Trust Company adopted a form of quit-claim contract and conveyance instead of the forms embodying warranties which had been used theretofore.

It is alleged that the issuance of patents commenced in 1871 and continued until 1877; during which period 323,148.68 acres were patented; that the issuance of patents was then suspended and not resumed until after the Southern Pacific Company had acquired control. But thereafter patents were rapidly applied for. Between 1893 and 1906, 2,-

THE BILL SUMMARIZED

442,448.45 acres were patented, making a total of 2,765,597.13 acres patented under the East Side grant, and that in addition to the patented lands, the Oregon and California Railroad Company claims title to about 293,000 acres unpatented; that under the act of May 4, 1870, no patents were issued until 1895; and that between that year and 1903, 128,618.13 acres were patented under that grant, making a total of 2,894,215.26 acres patented under both grants; which, with the unpatented lands, aggregate 3,187,215.26 acres.

The bill says that all patents were issued to the Oregon and California Railroad Company *as the successor* of the East Side Company *and* the West Side Company, respectively; and that no patents have been issued since 1906 under either grant, for reasons stated therein; it is further averred, in this connection, that all patents were issued by the Department of the Interior upon applications in writing of the Oregon and California Railroad Company, accompanied by affidavits, sworn to by duly authorized agent of that company, to the effect that all lands for which patents were asked were of the character contemplated by the grant under which they were claimed; and that the department officials, relying on these affidavits issued the patents.

It is then alleged that the Southern Pacific Company, between 1894 and 1903, developed a lively demand among wealthy land speculators and timber

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men for large quantities of land; that during that period the lands were disposed of without any regard for the terms of the grants; that they were sold in parcels of from 1000 to 45,000 acres to a single purchaser and at prices ranging from \$5.00 to \$40.00 per acre; that most of the sales in violation of the terms of the grants were subsequent to 1897; and that the total sales amounted to 820,000 acres, classified thus:

	Sales.	Acres.
Sales in quanties not exceeding one		
quarter section	4,930	296,000
Sales in quanties exceeding one		
quarter section	376	524,000

It is charged that sales were suspended and all the land withdrawn from market in 1903; that approximately 640,000 acres have been conveyed and there are outstanding about 830 executory contracts, covering approximately 174,000 acres. It is then stated, on information and belief, that substantially all of these contracts were made between 1898 and 1903, and that the average price fixed therein is in the neighborhood of \$10.00 per acre; to the bill is attached a schedule marked J, setting forth all the conveyances made and contracts pending.

It is further averred that the Oregon and California Railroad Company has received for lands sold \$4,970,273.59 and in addition several hundred

THE BILL SUMMARIZED

thousand dollars from the leasing of lands, sale of timber, and forfeitures of partially performed contracts of sale.

The bill alleges that the mortgage to the Union Trust Company has been treated by the parties thereto as a lien upon all the granted lands which remained unsold on May 12, 1887; that the Union Trust Company has joined in all conveyances of land since that time, has received substantially all the purchase money paid thereon and has applied the same on the \$20,000,000 indebtedness and thereby reduced it to \$17,500,000.

It is then asserted that close to 1,800,000 acres of the unsold lands are situated in the neighborhood of Eugene, Oregon, and constitute nearly one-half, in alternate sections, of all lands within approximately 40 miles of the railroad from Eugene to the southern boundary line of Oregon; that this territory is wholly dependent for railroad transportation upon the lines of the Oregon and California Railroad Company, operated by the Southern Pacific Company; that since 1903 well nigh 1000 persons have severally applied to the railroad company to purchase the unsold lands in quantities and at prices within the terms of the grants; that these persons desired to become actual settlers and establish their homes thereon; that in addition to these a large number of persons are ready and willing to pur-

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chase the lands within the terms prescribed by the grants, but that notwithstanding all this the railroad company withdrew all the lands from sale in January, 1903, and has ever since refused, and still refuses, to sell any thereof to actual settlers, and besides has resorted to divers means to discourage and obstruct the actual settlement of the lands within the terms of the grant; that this policy has prevented the development of the territory just described, has thwarted the establishment of competing railroads therein and has given, in effect, a monopoly of the land and transportation thereof to the Southern Pacific Company.

It is also charged that the present existence of the Oregon and California Railroad Company is a mere pretense, because the Southern Pacific Company, through its stock ownership and otherwise, controls it absolutely, originates its policy, and is in all respects responsible for its conduct; then follows the allegation, that ever since 1903 the Oregon and California Railroad Company, under the influence of the Southern Pacific Company, has assumed and now asserts an absolute and unconditional estate in all of the unsold lands, in violation of the terms of the grant; that these lands have not been reduced to possession or in any way improved, unless it be by persons claiming to have settled thereon; that the reasonable value thereof exceeds the sum of \$40,000,000; that none of the unsold lands are, or ever

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were, necessary for depots, stations, sidetracks, woodsheds, or any other needful purpose in operating the railroad, nor are they reserved or intended for any such purpose; and that the Oregon and California Railroad Company has repeatedly threatened to do acts impairing the title to the lands, to commit waste upon the lands, and will do so unless restrained.

Then follows the statement that prior to 1894 there was substantially no demand for the lands, except for the purpose of settlement; that during this period the Oregon and California Railroad Company maintained an immigration bureau to induce settlement; that in view of this, occasional violations of the terms of the grant were generally unknown; that since 1894 nearly all of the sales were by executory contracts and were not placed of record, and did not merge into deeds until many years thereafter; that a considerable number of these contracts are still outstanding, as heretofore stated, and that many of the conveyances were not placed upon record until recently and some are still unrecorded; that when the lands were withdrawn in 1903 the reason for doing so was concealed and the railroad company from time to time falsely represented that they had been withdrawn for temporary purposes only.

It is further averred that the Legislature of the State of Oregon, about February 14, 1907, in re-

THE BILL SUMMARIZED

sponse to repeated demands of the people, adopted and communicated to the Government a memorial (Exhibit L), pointing out the violations of the grants and charging in general terms the true facts in the premises; that thereupon the further issuance of patents was suspended and an investigation of the subject instituted by the Attorney-General; that this investigation was concluded in January, 1908, and the result was soon thereafter brought to the attention of Congress, which, on April 30, 1908, adopted the following joint resolution:

That the Attorney-General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described acts of Congress, to-wit: 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the acts approved June twenty-fifth, eighteen hundred and sixty-eight, and April tenth, eighteen hundred and sixty-nine; * * * Also 'An act

THE BILL SUMMARIZED

granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, eighteen hundred and seventy, including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said acts; and in and by any and all such suits, actions, or proceedings, the Attorney-General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States, relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts, respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney-General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and

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adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same.”

The bill then states that, pursuant to the foregoing resolution, this suit was commenced.

It also avers that by reason of the foregoing breaches all the unsold lands have been forfeited; that neither of the defendants, or any one claiming through or under them, has any right therein, and that by virtue of the foregoing joint resolution the complainant asserts title to, and resumes the title of, the forfeited lands.

It then states that all the lands sold, in violation of the terms of the grants, were forfeited, but were not included in the suit for certain reasons stated in the bill.

It is alleged that the mortgage to the Union Trust Company of July 1, 1887, to secure the payment of the \$17,500,000 of outstanding bonds, covers enough of property outside of the granted lands to more than satisfy the indebtedness; and it is asserted that the Trust Company has no interest in the lands, either by reason of the mortgage, or otherwise.

Attached to the bill are certain schedules; the one marked M sets forth all maps of surveys and locations filed in the office of the Secretary of the

THE BILL SUMMARIZED

Interior, by the grantees, pursuant to the conditions of the grants; the one marked N shows the time of the construction of the several sections of the road and telegraph lines, together with the dates in which the sections were examined, approved and accepted by the Government Commissioners; and the one marked O sets forth the quantity of lands patented from time to time, under each grant, compiled by years.

It is said that the cross-complainants and interveners claim an interest in the lands as actual settlers; that for the purpose of enforcing their claims some had commenced separate suits in the Circuit Court of the United States for the District of Oregon and one in the United States Court for the Western District of Washington, before this suit was instituted; that if said suits had been permitted to proceed they would have hindered and substantially prejudiced the rights of the Government in this action and therefore complainant asks that they be enjoined from further prosecuting the suits, but be permitted, if so advised, to become parties to this suit, and set up therein their respective claims.

The bill prays that the patented and unpatented lands, remaining unsold, be declared forfeited; that the title thereto be quieted in the complainant against all defendants, and all persons claiming through or under the defendants; that the defend-

CROSS-COMPLAINTS SUMMARIZED

ants, and each of them, be required to surrender to the complainant full possession, if any they have, to the lands in question; that all the defendants be enjoined from in any manner asserting title to the unsold lands; and that the Oregon and California Railroad Company, Southern Pacific Company, and Union Trust Company be required to account for any moneys received from or on account of the lands, and for general relief.

CROSS-COMPLAINTS.

Each of the cross-complainants alleges that he had, prior to the institution of the suit, actually settled upon a quarter section of the land described in the grants for the *bona fide* purpose of making his home thereon and of purchasing the land from the Oregon and California Railroad Company at the price of \$2.50 per acre, and that he had made tender to that company of the purchase price.

He then alleges substantially the same facts as those stated in the bill; but denies that the lands sued for by him "are or can be forfeited to the United States"; and asserts that he is ready and willing to pay into court for the Oregon and California Railroad Company the sum of \$400.00, the purchase price of the lands settled upon, prays that it be decreed that the railroad company holds the lands settled upon by him in trust and that the com-

PETITIONS IN INTERVENTION SUMMARIZED

pany be compelled to accept the money tendered and convey to him the lands.

PETITIONS IN INTERVENTION.

The interveners admit substantially all the allegations of fact contained in the bill, but deny that the lands applied for by them are subject to forfeiture.

It is alleged by each intervener that a long time prior to the commencement of the suit he applied to the Oregon and California Railroad Company to purchase a quarter section of land and offered to pay therefor the sum of \$2.50 per acre, and made due tender of the money, but that the same was refused; that at the time he made application it was his intention to make actual settlement upon the land and so stated to the company; he offers to deposit in court, for the use and benefit of the company, the sum of \$400.00 to pay for a quarter section of land at \$2.50 per acre.

It is further alleged by each that Congress intended to create a trust in the granted lands for the use and benefit of such citizens of the United States as should become actual settlers thereon and offer to purchase the same in accordance with the terms and under the restrictions imposed by the grants; that the land is held in trust by the Oregon and California Railroad Company for his benefit and for the

DEMURRERS—ANSWER SUMMARIZED

benefit of others of his class and he asks that the company be required to convey to him the land which he has applied for on the payment of the price thereof.

DEMURRERS.

The defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, demurred to the bill of complaint, the cross-complaints and the petitions in intervention; and the defendant Union Trust Company separately demurred to the cross-complaint.

All of the demurrers were submitted together, the court overruled the demurrer to the bill and sustained the demurrers to the cross-complaints and petitions in intervention. (R. II-677-695.)

The defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage filed a joint and several answer. The Union Trust Company answered separately. (R. III-1165.) The cross-complainants and interveners filed no further pleading.

ANSWER OF DEFENDANTS OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE.

The answer of the above named defendants admits substantially all the allegations of fact in the

THE ANSWER SUMMARIZED

bill, except as hereinafter stated and, therefore, no useful purpose would be served by detailing those admissions in this place.

Denials.

The answer denies that the East Side Company applied to Congress for an extension of time within which to file its assent to the act of July 25, 1866, or that it laid before Congress the joint resolution of the Legislature of Oregon and represented that the recitals therein were true; that the Oregon and California Railroad Company was organized by promoters or stockholders of the East Side Company; that the stock of the West Side Company was acquired by the owners of the Oregon and California Railroad Company; that the stock of both companies was at any time held by a single interest, or issued without consideration; that the West Side Company was dissolved in October, 1880; that the Oregon and California Company applied for any of the patents issued to it as the successor of the East Side Company, or that the Southern Pacific Company established a general land office for the disposition of lands of its constituent companies.

It denies that the applications of persons exceeding 1000 to purchase tracts of 160 acres were made in good faith, or that each applicant tendered \$2.50 for each acre at the time of making such application; that in addition a large number of persons had

THE ANSWER SUMMARIZED

settled upon the lands and offered to pay \$2.50 per acre; that it refused, or refuses, to sell any part of the unsold lands to actual settlers; that the lands have been converted to the use of the Southern Pacific Company and that a land monopoly has been maintained for the benefit of that company or that the industrial development of Oregon has been seriously retarded by reason of the Southern Pacific Company's refusal to sell the lands in question.

It further denies that the bill presents a suit of equitable cognizance.

It also denies that the conveyances made to the Oregon and California Company on October 6, 1880, by the West Side Company was for the purpose of merging the latter in the former company, and denies that Oregon and California Railroad Company thereby became the successor of the West Side Company.

It further denies that the Pacific Improvement Company was wholly owner or controlled by the owners of a majority of the stock of the Southern Pacific Company; that the latter company was the actual purchaser of the second mortgage bonds, or any part thereof, as alleged by the bill.

It denies that the Southern Pacific Company controlled the election of directors and officers of the Oregon and California Company, or influenced the corporate acts of the latter company; or that any of

THE ANSWER SUMMARIZED

the proceeds from the issue of the \$20,000,000 of bonds, secured by the mortgage to the Union Trust Company, was used by the Southern Pacific Company to purchase securities of the Oregon and California Company.

It also denies that no patent has been issued since 1906 under either of the grants, and says that Exhibit J, attached to the bill, is incorrect, but that Exhibit 4, attached to the answer, sets out correctly the matters referred to in Exhibit J.

ALLEGATIONS.

The answer *alleges* that construction of the East Side Company was commenced in the month of April, 1868, and that all the interests acquired by the East Side Company in the grant were free from the obligations of the amendatory act of 1869.

It avers that the lands not sold are essentially timbered lands, and are not susceptible of actual settlement; that only about 300,000 acres of all the lands granted are capable of actual settlement, and that nearly all of these lands have been sold to such settlers, in quantities of 160 acres, or less, and at prices not exceeding \$2.50 per acre.

It further alleges that it has paid \$1,827,234.10 in taxes, and sets forth what purports to be a statement of receipts and disbursements, on account of the lands, substantially as follows:

THE ANSWER SUMMARIZED

Receipts	\$5,506,199.22
Disbursements	3,242,777.00
	<hr/>
Profit	2,263,422.22

It asserts that for more than 40 years the Government had actual and constructive knowledge of the sales of land in quantities in excess of 160 acres to one person, other than an actual settler, and at prices in excess of \$2.50 per acre; that it had constructive knowledge of substantially all transactions by the defendants charged as unlawful and acquiesced therein and expressly approved and ratified some of them; that it issued patents for lands under the grants in question after diligent investigation by the proper officers of the Government; that it accepted and approved said railroads as constructed; that it has accepted free use of the railroads in the transportation of troops and munitions of war, and that the services thus rendered are worth \$1,000,000; that the Oregon and California Company relying upon said approval and acquiescence paid the taxes on the unsold lands to the amount of \$187,234.10, and made other expenditures amounting to the sum of \$145,977.26; and that no part of the money thus paid has been tendered back by the complainant; and it also alleges that, relying on said acceptance, approval and acquiescence, the Southern Pacific Company guaranteed the payment of said \$17,500,000 in bonds.

THE ANSWER SUMMARIZED

It further avers that this suit is barred by section 391 of Lord's Oregon Laws; section 8 of the act of Congress approved March 3, 1891, and by section 1 of the Act of Congress approved March 2, 1896; also that the complainant by reason of the passage of the Act of Congress approved January 1st, 1885, and the Act of September 29, 1890, has waived any right to claim a forfeiture.

It also alleges that persons claiming under the defendants have absolute title to the lands in question; that the Oregon and California Railroad Company is the owner of all the lands patented and unpatented, not heretofore sold, and denies that any of said lands is subject to forfeiture.

ANSWER OF THE DEFENDANT UNION TRUST COMPANY.

This answer is substantially the same as the answer of the other defendants with this addition: It alleges that by the Act of June 19, 1878, there was created in the Department of the Interior an Auditor of Railroad Accounts, to whom railroad companies west of the Missouri River, that had received land grants from the United States, should report in accordance with a system to be prescribed by him, and that by the act of March 3, 1881, the title of this officer was changed from Auditor of Railroad Accounts to Commissioner of Railroads.

THE ANSWER SUMMARIZED

In harmony with this law, it is alleged, the defendant Oregon and California Railroad Company made reports of its land sales each year, commencing in 1879 and continuing down to and including the year 1903. These reports show, so it is averred, that the company had sold land in quantities of more than 160 acres to one person, and at prices exceeding \$2.50 per acre. It is then stated that these reports were brought to the attention of the Secretary of the Interior who transmitted them to the President, and by the President were laid before Congress, where they were referred to the appropriate committee of each House and printed in House Executive Documents.

It is then stated that, notwithstanding the knowledge of the administrative officers of the Government and of Congress of the action of the Oregon and California Railroad Company in selling from the beginning lands in tracts greater than 160 acres to one person and at prices higher than \$2.50 per acre, complainant continued to issue patents to the company for the lands.

It is further averred that no executive officer ever challenged the correctness of the construction placed upon said act of Congress by the Oregon and California Railroad Company as shown by its said reports until the bill herein was filed in 1908.

THE FACTS ESTABLISHED

The act of August 20, 1912, is referred to and the claim is made that by its passage the United States waived all breaches of the terms of the grants.

It is then averred that by reason of the matters set out in the answer, the United States has waived all right to forfeiture of the lands and is estopped from asserting any claim thereto.

There is a formal replication to each answer.

THE FACTS ESTABLISHED.**Stipulation.**

Nearly all the controlling facts are covered by a stipulation (Stip. R. IV-1552).

Acts of Congress.

On July 25, 1866, Congress passed

An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon.

The act provides:

Sec. 1. That the California and Oregon Railroad Company, a California corporation organized to connect Portland, Oregon, with Marysville, California, and

Such company organized under the laws of Oregon as the legislature of said State shall hereafter designate,

THE FACTS ESTABLISHED

are authorized and empowered to locate, construct and maintain a railroad and telegraph line between the city of Portland, Oregon, and the Central Pacific railroad in California. The California and Oregon Company is to construct the part of the road and telegraph line in California and the Oregon Company the part in Oregon. The company completing its part first is authorized to continue the work of construction, with the consent of the State in which the unfinished part lies, upon the terms granted in the act, until both parts meet and are connected.

Sec. 2. That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in

THE FACTS ESTABLISHED

lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided also*, That settlers under the provisions of the homestead

THE FACTS ESTABLISHED

act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

Sec. 3. Gives from the public lands a right of way to the extent of 100 feet in width on each side of the road and all necessary grounds for stations, buildings, work shops, etc., and authorizes the taking from those lands of such earth, stone, timber and water as may be necessary for the construction of the road.

Sec. 4. That whenever the said companies, or either of them, shall have 20 miles of road and telegraph line ready for service, the President shall appoint three commissioners to examine the same; and if it shall appear that 20 consecutive miles have been completed and equipped, as required by the act, the commissioners shall so report to the President and thereupon patents shall issue to the companies, or either of them, for the lands granted to the extent and coterminous with the completed sections, and in this way, from time to time, whenever 20 or more consecutive miles of road and telegraph shall be completed and equipped, as aforesaid, patents shall issue until the entire road and telegraph line shall have been completed.

THE FACTS ESTABLISHED

Sec. 5. That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the Government of the United States, when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.

Sec. 6. That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year

THE FACTS ESTABLISHED

thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

Sec. 7. That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the Government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any State, of competent jurisdiction.

"Sec. 8. That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void,

THE FACTS ESTABLISHED

and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

Sec. 9. That the companies mentioned shall be governed by the provisions of the general railroad and telegraph laws of their respective states as to the construction and operation of the road and line in all matters not provided for in the act; and that "wherever the word 'company' or 'companies' is used in this act, it shall be construed to include the words 'their associates, successors or assigns' the same as if the words had been inserted, or thereto annexed."

Sec. 10. Excepted all mineral lands from the operation of the act, except that where they contain timber so much of the timber as shall be required

THE FACTS ESTABLISHED

for the construction of the road may be removed by the companies.

Sec. 11. That the companies shall obtain the consent of the legislatures of their respective States and be governed by the statutory regulations of those States in all matters pertaining to the right of way wherever the road and telegraph line shall not pass over the public lands of the United States.

Sec. 12. "That Congress may at any time, having due regard for the rights of said Oregon and California Railroad companies, add to, alter, repeal or amend this act."

ORGANIZATION OF WEST SIDE COMPANY.

For the purpose of organizing a corporation to be designated by the Legislature of Oregon as the beneficiary of so much of the lands granted by the Act of July 25, 1866, as were situate in Oregon, Joseph Gaston presented to the Secretary of State of Oregon on October 6, 1866, proposed articles of incorporation of the Oregon Central Railroad Company and requested him to file them. The Secretary received them and wrote upon them "October 6, 1866" and at the request of Gaston handed them back to him, who took them away. At the time the articles were presented to the Secretary they bore the signatures of eight persons, but no certificate of acknowledgment (Stip. R. IV-1554). A triplicate

THE FACTS ESTABLISHED

of the articles was filed in the office of the county clerk of Multnomah County, Oregon, under circumstances similar to those attending the filing with the Secretary of State, and a copy thereof was retained by Gaston as custodian for the incorporators (Gaston R. IV-1836-7).

The Legislature, on October 10, 1866, four days after the proposed articles of incorporation had been presented to the Secretary, as above stated, adopted the following joint resolution:

Whereas, The Congress of the United States, at its last session, passed an act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland, Oregon, and made it the duty of the Legislative Assembly of the State of Oregon to designate the company, organized under the laws of Oregon, which shall receive that part of said land grant lying within the State of Oregon; therefore be it

Resolved by the House, the Senate concurring, That the "Oregon Central Railroad Company," a company organized under the general incorporation laws of this State, be and the same is hereby designated as the company which shall be entitled to receive the land granted and all the benefits of an Act of Congress approved

THE FACTS ESTABLISHED

July 25, 1866, entitled "An Act granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon," so far as the said grant applies to the State of Oregon.

(Ans. R. II-865.)

On November 21, the same year, the articles of incorporation were returned to the office of the Secretary of State with ten additional names and two notarial certificates appended thereto. One certificate, dated November 16, same year, was to the effect that on or about September 29th, of that year, the articles had been acknowledged, signed and sealed by those whose names were signed thereto at the time when they were first presented to the Secretary of State. And the other certificate, dated November 20, same year, stated that the ten who had subsequently signed did so at a date after the designation of the corporation by the legislature. Upon the return of the articles they were again endorsed by the Secretary of State, but this time as having been filed on November 21, 1866 (Stip. R. IV-1554, 1625).

The stockholders of the company held their first meeting on May 24, 1867; shortly before this Joseph Gaston, as trustee for the company, subscribed for

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one-half of the capital stock for the stated purpose of legalizing the corporation, other parties signed for a share or two (Gaston, R. IV-1757-1834). At this meeting officers and directors were elected (Govt. Ex. 100-A. R. IX-4286). The next day, May 25, the board of directors adopted a resolution assenting to the Act of Congress of July 25, 1866, and on July 6, following, caused a certified copy thereof to be filed in the office of the Secretary of the Interior, together with a certified copy of the articles of incorporation and a certified copy of the joint resolution of the legislature of Oregon, above referred to. On August 20, following, the company filed in the same office a map of survey of its projected line of railroad (Stip. R. IV-1555). This line lay on the west side of the Willamette River and by reason of this it became known as the "West Side Line," and the company as the "West Side Company" (Stip. R. IV-1555).

ORGANIZATION OF EAST SIDE COMPANY.

On April 22, 1867, there were filed in the office of the Secretary of State for Oregon, articles of incorporation of another company under the same name as the first company, Oregon Central Railroad Company, with principal place of business at Salem, Oregon (Stip. R. IV-1555). The first meeting of the incorporators of this company was held on the same day. At this meeting George L. Woods

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was instructed by those present to subscribe for 70,000 of the 72,500 share sauthorized "for the use and disposal of the company" (Govt. Ex| 100—B. R. X.-4895). This company became known as the "East Side Company," and its line of railroad as the "East Side Line" by reason of the location of the line on the easterly side of the Willamette river (Stip. R. IV-1556).

CONTROVERSY BETWEEN THE TWO COMPANIES.

Immediately after the filing of the articles of incorporation of the East Side Company, a controversy arose between it and the West Side Company over the use of the corporate name (Gaston, R. IV-1789). During the first part of the year 1868, each company attacked the legality of the other. Pamphlets were issued (Govt. Exs. 103 and 104, R. X. 5153-5158) and public meetings held (Gaston, IV-1764), at which the East Side Company was represented by John H. Mitchell, afterwards United States Senator from Oregon, and I. R. Moores, and the West Side Company by Joseph Gaston (Gaston, R. IV-1758). At this time the East Side Company made no claim to the land grant under the Act of Congress of July 25, 1886 (Gaston, R. IV-1770), and in a pamphlet issued by it, (Govt. Ex. 104-R. X.-5158) about May 1, 1868, a positive disclaimer was made in words as follows:

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The charge has been extensively circulated that we are seeking to defraud the west side of the river of a valuable franchise—of state and government aid—in answer to which we have only to say, that we recognize that the Act of Congress granting lands, and the Act of the last legislature of Oregon, are both inoperative, from the fact that the terms and stipulations of those Acts have not been, and cannot be, complied with. Any aid to be granted railroad enterprises in Oregon must be re-enacted by both the state and general government * * * .
(Gov. Ex. 104-R. X.-5172.)

The West Side Company began construction work on April 15, 1868 (Gaston, R. IV-1760), and at the end of that year the larger bridges were built and the road graded for the first five miles out of Portland (Gaston, R. IV-1762). On June 25, same year, Congress passed an Act extending the time for the construction of the road by providing that “the first section of twenty miles of said railroad and telegraph line shall be completed within eighteen months from the passage of this Act, and at least twenty miles in each two years thereafter and the whole on or before July 1, 1880.” In a pamphlet issued by Gaston, as president of the company, it is stated that this Act was passed at the solicitation of the West Side Company (Stip. R. X.-5247).

THE FACTS ESTABLISHED**EFFORTS OF THE EAST SIDE COMPANY TO SECURE THE GRANT.**

The East Side Company began work on April 16, 1868, (Gaston, R. IV-1760), and prior to February, 1869, had expended about \$150,000 in grading (Gaston, R. V.-2423), between Portland and Salem (Himes, R. V.-2443). About September 12, same year, the West Side Company discovered that the East Side Company was making an effort to have the Oregon Legislature designate it as the beneficiary of the land grant under the Act of Congress of July 25, 1866, (Gaston, R. IV-1768-1770). Both companies appeared before the legislature, the East Side Company represented by John H. Mitchell and Ben Holladay (who had a short time before secured control of the East Side Company), and the West Side Company by James K. Kelly (Gaston, R. IV-1771). The contest resulted in the passage by the legislature on October 20, 1868, of the following joint resolution:

Whereas, The Congress of the United States, by an Act approved July 25, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," did grant certain lands in the State of Oregon, and confer certain benefits and privileges upon such company organized under

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the laws of Oregon as the Legislature of said State should thereafter designate; and

Whereas, The Legislative Assembly of Oregon, at its fourth regular session, did adopt a joint resolution known as "House Joint Resolution No. 13," designating in terms the Oregon Central Railroad Company as the company entitled to receive the land granted by, and all the benefits and privileges of, the said Act of Congress; and

Whereas, At the time of the adoption of the said joint resolution as aforesaid, no such company as the Oregon Central Railroad Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and

Whereas, The designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred by, the said Act of Congress, yet remains to be made;

Be it Resolved by the Senate, the House concurring, That the Oregon Central Railroad Company, a corporation organized at Salem on the twenty-second (22d) day of April, in the year one thousand eight hundred and sixty-seven (1867), under and pursuant to the laws

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of the State of Oregon, be and the same is hereby designated as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said Act of Congress. (Gaston, R. IV-1772.)

After this action, the contest between the companies was carried before Congress. The Act of 1868 required, as we have seen, that assent to its provisions be filed by the designated company within one year after its passage. This time had elapsed before the East Side Company secured its designation. Application was, therefore, made to Congress by that company for an extension of time. The West Side Company resisted. John H. Mitchell represented the East Side Company, and Simon G. Reed the West Side Company at Washington (Gaston, R. IV-1772). A pamphlet (Govt. Ex. 105-R. X.-5176) was prepared by Mitchell and approved by the East Side Company November 25, 1868, (Govt. Ex. 100-B. R. X.-5023) defending the right of that company to the benefits of the Act of July 25, 1866. This pamphlet was prepared for circulation in Washington only. A copy of it was found in the files of the Secretary of the Interior (Griffith, R. IV-1900). In answer to this pamphlet, Reed and President Gaston, prepared pamphlets for use before Congress (Govts. Ex. 106, R. X.-5228) setting forth the claims of the West Side Company

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and opposing an extension of time for filing the assent required by the Act of 1866 (Gaston, R. IV-1792). The minutes of the East Side Company show a payment to John H. Mitchell on account of his trip to Washington with reference to this matter (Govt. Ex. 100-B., R. X.-5026). On January 19, 1869, Senator Williams of Oregon wrote a letter to the Secretary of the Interior with respect to the controversy between the two companies in which he said:

I have nothing to say as to the rights or claims of either company, but in view of the fact that the articles of incorporation of the West Side Company were not filed in the office of the Secretary of State until after its designation by the Legislature in 1866, and in view, also, of the fact that the East Side Company cannot file its assent as required by the sixth section of said Act, I am apprehensive that the benefits of the said Act will be wholly lost to the state unless something is done to prevent it.

The Secretary replied the next day. He assumed that the statement made by the Senator, with respect to the organization of the West Side Company was correct, then referred to the bill pending before Congress for an extension of time within which to file the assent, and said:

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The passing of the bill, as stated, is to authorize this company (meaning the East Side Company) to file its assent without prejudice to the rights or interests of the other company, and you ask for an expression of my views as to whether there is any necessity for the proposed legislation. In reply I have the honor to state that as the matter now stands that the grant, so far as the portion in Oregon is concerned, has lapsed, while the grant for that portion of the road situated in California is still in force, and some legislation by Congress is necessary to revive the grant for the Oregon portion of the line. The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose. (Govt. Ex. 130, R. IV-1913).

The bill referred to was passed April 10, 1869, and reads:

That section six * * * be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all

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intents and purposes as if such assent had been filed within one year after the passage of said act: *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: *And provided further*, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

Two days after the approval of this act John H. Mitchell, as the attorney of the East Side Company, addressed a letter to the Secretary of the Interior reciting the terms of the act of July 25, 1866, and of April 10, 1869, touching the time for filing assent, and said:

This assent will be presented for filing as soon as I can return to Oregon and have a resolution for that purpose adopted by the company.

He then requested the Secretary not to recognize the West Side Company, called attention to the above letter of the Secretary, addressed to Senator Williams, and asked that no action be taken until the assent of the East Side Company could be filed (Govt. Ex. 130, R. IV-1914).

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The East Side Company, through its board of directors, on June 8, 1869, adopted a resolution reciting the passage of the act of July 25, 1866, the provisions therein relating to the designation by the Legislature of Oregon of a company to receive the grant made thereby, the requirement that the company designated should file its assent with the Department of the Interior within one year from the date of the passage of the act, that no company so designated had done so, that the East Side Company had been designated by the legislature of Oregon, that Congress had passed the act of April 10, 1869, extending the time within which the company designated might file its assent, and then said:

This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges and franchises of said act of July 25, 1866, * * * and of *all acts amendatory* thereof, upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto.

The resolution follows with a direction to the secretary of the company to file a certified copy thereof in the office of the Secretary of the Interior, which was done on June 30, 1869. On October 29, same year, the company filed in the same office a map of survey of location of the first 60 miles of

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its projected line (Stip. R. IV-1557), and on December 24, following, it completed the first 20 miles within the prescribed time (Stip. R. IV-1557).

WEST SIDE COMPANY ABANDONS ALL CLAIMS TO THE GRANT UNDER ACT OF 1866, AND SECURES INSTEAD THE GRANT MADE BY THE ACT OF MAY 4, 1870.

The West Side Company failed to complete the first 20 miles of its line within the time required and after that "it never made any claim to the grant" made by the act of 1866 (Gaston, R. IV-1775, 9). Immediately after the failure Gaston initiated efforts to secure a new grant for the West Side Company, which resulted in the passage of the act of May 4, 1870. (Gaston, R. IV-1779, *et seq.*) which provides:

That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands

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for depots, stations, sidetracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid preemption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

Sec. 2. That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with

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such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

Sec. 3. That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections.

Sec. 4. That the said alternate sections of land granted by this act, excepting only such

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as are necessary for the company to reserve for depots, stations, sidetracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

Sec. 5. That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first-mortgage construction bonds of the company, on the road depots, stations, sidetracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and canceled; and each of the said first-mortgage bonds shall bear the cer-

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tificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

Sec. 6. That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date.

On July 2, 1870, the company, through its directors, assented to and accepted all the provisions of the grant, and on July 20, following, filed the assent in the office of the Secretary of the Interior, as required by the act (Stip. R. IV-1559).

ORGANIZATION OF THE DEFENDANT OREGON AND CALIFORNIA RAILROAD COMPANY.

In the year 1869 the East Side Company was involved in litigation, wherein the validity of its in-

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corporation and the right to use its corporate name were questioned (Gaston, R. IV-1762, *et seq.*; Newby v. Oregon Central Railroad Company, Fed. Cas. 10144, 10145).

(Note: The Supreme Court of Oregon in Holladay vs. Elliott, decided in 1879, that the "attempted organization of the O. C. R. R. Co. (East Side Company) amounted to nothing, was absolutely void, nor did the joint resolution of the legislative assembly adopted October 20, 1868, recognizing this corporation as the one entitled to receive the land granted by Act of Congress * * * cure the inherent defects of its organization." (8 Ore. 91; Stip. R. IV-1623.)

On March 17, 1870, articles of incorporation of the Oregon and California Railroad Company (defendant) were filed in the office of the Secretary of State for Oregon. Ben Holladay, J. C. Hawthorne and I. R. Moores were among the signers of the articles. Holladay was at this time in control of the East Side Company through stock ownership. Moores was president and Hawthorne a director of the same company (Govt. Ex. 100-B-5058). The articles recited the purpose of the corporation to be, among other things, to acquire,

Particularly and especially all the right, title, interest, franchise, claim and demand

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which the said Oregon Central Railroad Company of Salem, Oregon, (East Side Company) * * * now has or is entitled to, and to which it may hereafter be entitled under and by virtue of an Act of Congress * * * approved July 25, 1866, and of all amendments thereto. And to construct and establish the whole thereof (railroad and telegraph line) from Portland in Oregon, to the California line in all respects in accordance with the Act of Congress hereinbefore referred to and the amendments thereto, and for the purpose of receiving all the benefit of such acts of Congress and amendments thereto, and intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of said act. (Bill, R. I-89; Stip. R. IV-1558.)

By an instrument, dated March 29, 1870, the East Side Company assigned and conveyed to the new corporation, the Oregon and California Railroad Company, all of its property, including the land grant, with present and future rights under the act of July 25, 1866, and acts *amendatory* thereof. This instrument recites that the

Oregon Central Railroad Company * * * did afterwards and in pursuance of the act of Congress aforesaid (act of July 25, 1866), and of the acts amendatory thereof and supple-

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mental thereto, file its assent in writing to said Act of Congress and all the provisions thereof * * * was recognized by the Department of the Interior as the corporation in Oregon entitled to take and manage the congressional grant hereinbefore referred to and receive the benefits thereof * * *

and did

Afterwards proceed to locate the line of said railroad, and did locate the same for a long distance and did prepare and file its maps in the office of the Secretary of the Interior in strict accordance with the said act of July 25, 1866, and amendments thereto aforesaid" (Stip. R. IV-1558).

By action of the stockholders and of the board of directors at meetings held March 28 and 29, following, the East Side Company was dissolved (Govt. Ex. 100-B; R. X.-5099, 5117).

THE ASSENT OF THE OREGON AND CALIFORNIA RAILROAD
COMPANY.

On April 4, 1870, the Oregon and California Railroad Company, through its board of directors, adopted a resolution reciting that that company had purchased and taken an assignment from the East Side Company of its property, including

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All the right, title, interest and claim, both legal and equitable, absolute and contingent, of the East Side Company to the lands and all other benefits granted to that company by the act of July 25, 1866, and amendments thereto, and said:

Resolved, That this company do accept the grant conferred by such Act of Congress (July 25, 1866) and all the benefits and emoluments thereunder or thereby granted, upon the terms and conditions therein specified;

And Resolved, That the president and secretary of this company be, and they are hereby, authorized to file the assent of this company to such act of Congress and amendments thereto, as aforesaid, in the office of the Secretary of the Interior. * * * And that a copy of the deed of assignment from the Oregon Central Railroad * * * be also filed in the same office.

This was done on April 28, following. It is stipulated in the record that

At all times since the date of said instrument, (conveyance of March 29), the defendant Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company in and to all the franchises, rights and property granted, or

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intended to be granted by the said Acts of Congress. (Stip. R. IV-1559).

Under date of May 7th, same year, the Secretary of the Interior informed the Commissioner of the General Land Office, that evidence had been filed by the Secretary of the East Side Company

That said company has sold and transferred all its rights, interests, etc., to the Oregon and California Railroad Company, of Portland, Oregon.

This notice was acknowledged by the Commissioner May 23, 1870, and on the same day he wrote notifying the Register and Receiver of the United States Land Office at Oregon City, Oregon, of the information received from the Secretary of the Interior (Deft. Ex. 373, R. XIV-7371). This matter was again considered in 1871, and an opinion rendered by the Assistant Attorney-General for the Interior Department, to the effect that the use of the word "assigns" in the Act of Congress of July 25, 1866, authorized the conveyance of the grant by the East Side Company to the Oregon and California Railroad Company. After some correspondence between the Attorney-General and Secretary of the Interior, the matter was permitted to stand on the action of the Secretary of the Interior in his notification to the Commissioner of the transfer of the grant (Deft. Ex. 376; R. XIV-7439).

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OREGON AND CALIFORNIA RAILROAD COMPANY SECURES
CONTROL OF WEST SIDE COMPANY.

In the spring of 1870, Holladay, controlling practically all of the stock of the Oregon and California Railroad Company and being its president (Defts. Ex. 341, R. XIV-7309, Govts. Ex. 129, R. XI-5765), entered into negotiations with Joseph Gaston to acquire control of the West Side Company, offering, among other inducements, a township of the granted lands in part payment for a majority of the stock of that company. This, Gaston at first refused, upon the ground that Holladay could not dispose of the granted lands that way but must conform to the provisions of the granting acts and sell to actual settlers (Gaston, R. IV-1787). Later, however, Gaston, having been offered \$50,000 and employment for a term of years, yielded to Holladay's wishes and assigned a majority of the stock of the West Side Company to R. H. Towler, private secretary to Holladay, and immediately thereafter Holladay assumed control of the company (Gaston, R. IV-1797). This transfer was made on or about August 15, 1870 (Govt. Ex. 100-A; R. IX-4424). Holladay continued in control of the two companies until he surrendered the same to the bondholders committee (Gaston, R. IV-1788, 1798), under an agreement dated February 29, 1876 (Govt. Ex. 126-D; R. XI-5603).

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EARLY EFFORTS TO HAVE EXECUTIVE OFFICES OF THE GOVERNMENT PUT UPON THE GRANTS A CONSTRUCTION SOMEWHAT SIMILAR TO THAT NOW CONTENTED FOR BY DEFENDANTS.

On April 15, 1870, the Oregon and California Railroad Company, conveyed the granted lands to trustees to secure a bond issue of \$10,950,000. The trustees were given the right to sell or dispose of the lands upon such terms as the president of the Oregon and California Railroad Company might approve, the proceeds of the sales to be applied to the payment of the interest and principal of the bonds secured (Govt. Ex. 126-A, R. XI-5530).

By an instrument dated March 20, 1871, the trustees and the Oregon and California Railroad Company, assigned and conveyed the lands to the European and Oregon Land Company (a California corporation organized by Holladay) (Gaston, R. IV-1840), describing them as lands granted by the Act of July, 1866, and "acts amendatory and supplemental thereof." Under the conditions of this instrument the lands were to remain in the possession of the grantor trustees until the grantee had paid the agreed price. (Gov. Ex. 126-I. R. XI-5734.)

Joseph S. Wilson, as president of the European and Oregon Land Company, under date of January 17, 1872, wrote George H. Williams, then Attorney General of the United States and former Senator from Oregon, with respect to the land grants. He

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called attention to the actual settlers provision of the act of April 10, 1869, and said that, in pursuance of a legal opinion, the board of trustees of his company had ordered that persons who had become actual settlers between July 25, 1866, and April 10, 1869, should have the privilege of purchasing not to exceed 160 acres at \$2.50 an acre, but as to *all others* the company was *not* legally restricted from selling on liberal terms, for cash or credit, at reasonable rates. He further stated that he had been directed by the company to lay the facts before the Attorney-General, to the end that the same might be referred to the Interior Department, with the request that the liberal construction given by the trustees of the company might be approved (Gov. Ex. 109; R. X.-5339). With this letter he enclosed a copy of the legal opinion referred to, and also a copy of the minutes of his company, setting forth the above agreement between it, the trustees named in the instrument conveying the lands to it, and the Oregon and California Railroad Company. This letter, with the papers attached thereto, was not sent directly to the Attorney-General, but was enclosed with another letter to President Holladay of the Oregon and California Railroad Company. In the latter letter Mr. Wilson requested Mr. Holladay to ask the Attorney-General to procure from the Secretary of the Interior a construction of the grants

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desired (Gov. Ex. 109; R. X.-5341), and enclosed a draft of the decision sought. We quote therefrom:

The Department has considered the papers you referred from the European and Oregon Land Company, in right of the Oregon and California Railroad Company, under the Grant in Western Oregon, by Act of Congress approved 25th July, 1866, (Statutes Vol. 14, page 239) and the Amendatory Act of 10th April, 1869, (Stat. 1869, page 47) and is satisfied that the construction given by the said company is just and proper, to the effect that an actual settler on the odd sections from 25th July, 1866, the date of the Original Grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869, and all those who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding one hundred and sixty acres, at two dollars and fifty cents per acre—but that in regard to all other persons, the Original Absolute Grant, by Act of 25th July, 1866, is in full force and effect, and authorizes the company to sell on such terms as may be reasonable and just to all parties without any restrictions. (Gov. Ex. 109-R. X.-5346.)

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Attorney-General Williams on April 20, 1872, wrote to the Commissioner of the General Land Office:

I enclose some papers which have been transmitted to me by the Attorney of the Oregon and California Railroad Co. to be filed I suppose in your office.

You will see that they relate to the construction of an amendment to the act granting lands to said Co. (Gov. Ex. 109-R. X.-5364.)

The Commissioner on May 20, 1872, laid before the Secretary of the Interior this letter and all accompanying papers and stated that the purpose of the enclosed correspondence was to obtain a construction of the actual settlers provision of the Act of Congress of April 10, 1869. To the Commissioner's letter the Secretary replied, under date of June 5, 1872, as follows:

I have considered the question presented in the papers transmitted with your letter of the 20th ultimo, as to the meaning of the last proviso of the Act approved 10th April, 1869, amendatory of the Act of 25th July, 1866, 'granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon,' and am of opinion that the proviso

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means just what it says, 'that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in large quantities to other than actual settlers; and to limit the proviso's operation to those on the lands granted at or before the survey of the road, would, in my judgment, utterly defeat such intention.

The papers transmitted with your letter are herewith returned. (Gov. Ex. 109-R. X.-5343.)

The Commissioner on June 14, same year, transmitted this opinion to the Attorney-General (Govt. Ex. 109, B; R. X-5367).

An entry on the jacket in the files of the General Land Office containing the correspondence on this subject shows that on June 27, 1872, the Attorney-General returned certain papers relative to the Oregon and California Railroad Company and asked a recall of the Secretary's opinion (Govt. Ex. 109-R. X.-5322).

Under date of July 16, 1872, the Commissioner wrote to the Attorney-General a letter from which we quote:

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I have the honor to acknowledge your communication of 27th ult., returning certain papers filed with you, by B. Holladay, Esq., relative to the construction to be placed on the last proviso of the Act of 10th of April, 1869, amendatory of the Act of 26th of July, 1866, granting lands for the Oregon & California Railroad.

It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would be necessary for the Department to decide, etc. You, therefore, ask * * * that the opinion which the Secretary has given upon the subject may be withdrawn until some question is raised, making it necessary to pass upon the construction of the Act mentioned, or until the parties interested desire an opinion on the subject.

He then analyzed the papers laid before him and concluded thus:

I certainly had no doubt but that the Company did desire, and asked for, the view of the office on the matter.

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It was not understood that you desired the opinion, but the letter was addressed to you because I viewed you as the medium of communication adopted by the Company.

Your request for a recall of the opinion expressed was presented to the Secretary who desires me to state that while he must respectfully decline to formally withdraw his opinion, yet, in view of your letter, he will be willing at any time, on application to reopen the case and to have all arguments the Company may desire to present upon the matter.

The papers have, as you requested, been placed on file. (Govt. Ex. 109-D, R. X.-5370).

[It was stipulated between the parties in this suit that all the facts and circumstances proven by Govt. Ev. 109 (R. X.-5322) should for all purposes be deemed to have been specifically pleaded in detail in the bill of complaint (Stip. R. IV-1909).]

By an instrument dated July 25, 1874, the European and Oregon Land Company reconveyed to Latham, Atherton and Norris, as Trustees, the lands in question, except about four thousand acres which the company had sold. (Gov. Ex. 126-G, R. XI-5688.)

By a trust deed dated July 15, 1871, the *West Side Company* conveyed to Milton S. Latham and

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Faxon D. Atherton, Trustees, all of its railroad property, and the land grant under the act of May 4, 1870, to secure a bond issue of \$4,395,000.00 (Govt. Ex. 126-B, R. XI-5548).

PROGRESS OF CONSTRUCTION ON BOTH LINES AND FINANCIAL DIFFICULTIES UP TO OCTOBER 6, 1880.

By the sale or pledge of mortgage bonds approximately \$8,000,000 was procured by the Oregon and California Railroad Company during the year 1870, and nearly \$1,000,000 was raised in the same way during 1871 by the West Side Company. With the funds thus secured the work of construction on both railroads was proceeded with, on the West Side line until 1871 and on the East Side line until 1873. On the dates mentioned the West Side line was completed from Portland to McMinnville, a distance of 47 miles, and on the East Side line to a point near Roseburg, a distance of 197 miles. Work was then suspended for want of funds. It was never resumed on the West Side line and on the East Side line not until 1881 (Stip. R. IV-1560, 1561).

On or about July 24, 1874, control of the financial affairs of both companies was taken over by a bondholders' committee, and in February, 1876, the same committee acquired all the stock of both companies and held the same until 1881 (Govt. Ex. 126-D; R. XI-5603; Stip. R. IV-1561).

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WEST SIDE COMPANY TRANSFERS ALL ITS PROPERTY TO THE OREGON AND CALIFORNIA RAILROAD COMPANY AND IS DISSOLVED.

The West Side Company, in October, 1880, assigned and conveyed to the Oregon and California Railroad Company all its property, including its interest in the land grant of May 4, 1870. The stated consideration being the payment of all the debts of the West Side Company. A copy of this conveyance was filed with the Secretary of the Interior about October 20, 1880 (Stip. R. IV-1561).

The stockholders approved the conveyance and at the same time adopted a resolution, which reads, in part, as follows:

Resolved, that this company, the Oregon Central Railroad Company be, and the same is hereby, dissolved, to take effect on the transfer of the propetry of this company and the settling of its business (Govt. Ex. 100-A; R. IX-4871).

On May 28, 1883, the board of directors passed a resolution to the effect that at the time of the dissolution of the company, and the disposal of its property, there was some property which was not conveyed, because it was in litigation, and then authorized the transfer of this property to the Oregon and California Railroad Company (Govt. Ex. 100-A; R. IX-4874).

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At all times since the date of the conveyance by the West Side Company, on October 20, 1880, the Oregon and California Railroad Company has assumed to be the successor of that company under the grant of May 4, 1870 (Stip. R. IV-1561).

PROGRESS IN THE CONSTRUCTION OF THE RAILROAD, FINANCIAL TRANSACTIONS OF THE OREGON AND CALIFORNIA RAILROAD COMPANY AFTER 1880, AND STEPS BY WHICH THE SOUTHERN PACIFIC COMPANY SECURED CONTROL OF THAT COMPANY.

All of the outstanding capital stock of the Oregon and California Railroad Company was cancelled on or about May 7, 1881. The authorized capital stock was then established at, and still is \$19,000,000, consisting of \$12,000,000 preferred and \$7,000,000 common. This stock was issued and accepted in part payment of the existing indebtedness; the balance was taken care of by a bond issue and *all* mortgages and *other* instruments purporting to secure the indebtedness were satisfied and cancelled (Stip. R. IV-1562).

In pursuance of the adjustment of its financial affairs the Oregon and California Railroad Company, on June 2, 1881, delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as trustees for the owners and holders of the preferred stock, a trust deed covering all its property.

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By subsequent action under the last mentioned trust deed, Stephen T. Gage (defendant) became, and is now the only surviving trustee thereunder. The defendant Southern Pacific Company is the present owner of all of the preferred stock (Stip. R. IV-1563). Gage, as such trustee, and the Southern Pacific Company, as the owner of the stock, assert a lien upon the lands covered by the trust deed.

By two separate issues of bonds, bearing date June 1, 1881 and May 26, 1883, respectively, (known and designated as "First Mortgage Bonds" and "Second Mortgage Bonds"), the Oregon and California Railroad Company procured approximately \$5,000,000 for its construction fund. And about June 1, 1881, the work of constructing the East Side Railroad was resumed and thereafter continued until about January, 1884. During this period the road was extended from Roseburg to Ashland, Oregon, a distance of approximately 145 miles (Stip. R. IV-1563). In January, 1884, construction was discontinued.

About January 19, 1885, default having been made in the payment of interest, suit was brought in the United States Circuit Court for Oregon, by certain of the first mortgage bondholders and the company was placed in the hands of a receiver. (Stip. R. IV-1564).

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The Central Pacific Railroad Company, by consolidation, became about this time the owner of the Western Pacific Railroad Company and the California and Oregon Railroad Company. In this way it secured all the lands granted to the California and Oregon Company by the act of July 25, 1866, in addition to its own lands acquired under the act of July 2, 1864, and continued to be the owner of all these lands until 1899. In February, 1885, it leased its line of railroad from Ogden to San Francisco and the branch thereof from Roseville Junction to Delta, California, together with certain other railroads and properties used in connection therewith, to the Southern Pacific Company for a period of ninety-nine years. Under this lease the Southern Pacific Company took possession of the property covered thereby and has ever since held and controlled the same (Stip. R.IV-1569; Ans. R.II-957).

On October 11, 1886, the Central Pacific Railroad Company, Pacific Improvement Company (a California corporation), and the Southern Pacific Company, made an agreement whereby the Pacific Improvement Company was to construct a line of road which would connect the Central Pacific lines with the lines of the Oregon and California Company. This agreement further provided that the Pacific Improvement Company would, within a reasonable time, purchase and obtain possession and control of

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the Oregon and California Railroad Company (Stip. R. IV-1571).

Prior to this time the stockholders of the last named company had organized under the name of the "Stockholders' Committee"; certain of the bondholders thereof under the name of "Frankfort Bondholders' Committee" and certain others of the bondholders thereof under the name of the "London Bondholders' Committee." The Bondholders' Committees represented the owners of substantially all of the first and second mortgage bonds then outstanding. (Stip. R. IV-1572).

In March, 1887, the Pacific Improvement Company became the owner of a controlling interest in the Southern Pacific Company and continued to hold the same until April, 1901 (Stip. R. IV-1573). About this time, to wit, March 28, 1887, a contract was entered into between the Pacific Improvement Company, the committees just mentioned, the Southern Pacific Company, and the Union Trust Company of New York, which resulted in the transfer of all the capital stock and all the second mortgage bonds of the Oregon and California Railroad Company to the Pacific Improvement Company and of all the first mortgage bonds of the Oregon and California Railroad Company to the Southern Pacific Company (Stip. R. IV-1572). The stock thus transferred to the Pacific Improvement Company was held by

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it until 1901, and then delivered to the Southern Pacific Company, which has ever since owned and held the same.

On July 1, 1887, the Oregon and California Railroad Company conveyed to the Union Trust Company of New York by trust deed all its railroad lines constructed or to be constructed and all its other properties including both land grants, to secure the payment of a \$20,000,000 bond issue. The payment of these bonds was guaranteed by the Southern Pacific Company. Part of the proceeds of this bond issue was used to pay the first and second mortgage bonds issued June 1, 1881, and May 26, 1883, respectively (Stip. R. IV-1573, 1575):

On the same day on which the aforementioned trust deed was executed, namely, July 1, 1887, the Oregon and California Railroad Company leased all its property to the Southern Pacific Company for a period of forty years; pursuant to this agreement the lessee took possession of the property. On June 6, same year, a contract was entered into between the Oregon and California Railroad Company and the Pacific Improvement Company for the construction by the latter company of the former company's railroad from a point near Ashland, Oregon, south to the northern boundary line of the State of California, there to connect with the California and Oregon Railroad, and to equip the road

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with rolling stock and a telegraph line. At the time this contract was made a large part of the work provided for therein had been done by the Pacific Improvement Company (Stip. R. IV-1576). In December following, the railroad was completed and connected with the line of the California and Oregon Railroad Company (Hood, R. IV-2061).

January 1, 1888, the Central Pacific Railway Company leased to the Southern Pacific Company its railroad from Delta to the northern boundary line of the State of California, and thus the Southern Pacific Company secured control of the entire line from Portland to Delta (Stip. R. IV-1570). On June 6, following, the receivership proceedings against the Oregon and California Railroad Company heretofore referred to were dismissed, the receiver discharged, and all the first and second mortgage bonds issued prior to July 1, 1887, cancelled, and the mortgages securing them released (Stip. R. IV-1576).

On July 29, 1899, the Central Pacific *Railroad* Company conveyed to the Central Pacific *Railway* Company all of the unsold lands of the three land grants owned by it (Stip. R. IV-1568), and on August 1, 1899, the Southern Pacific Company became, and has since remained, the principal stockholder of the Central Pacific *Railroad* Company and Central Pacific *Railway* Company (Stip. R. IV-1571).

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On August 1, 1893, the lease of July 1, 1887, between the Oregon and California Railroad Company and the Southern Pacific Railroad Company was abrogated and a new one entered into for a period of thirty-four years. In this lease the Southern Pacific Company agreed, among other things, to pay all expenses connected with the lands and the land department of the Oregon and California Railroad Company, except as the same should be paid from the rentals or proceeds of the lands, and in addition to this it agreed to pay \$5000 per year which so far as requisite was to be applied by the Oregon and California Railroad Company to the "expense of maintaining and keeping up its corporate organization under the laws of the state of Oregon." Under this lease the Southern Pacific Company has ever since operated the lines of the Oregon and California Company.

ADMINISTRATION OF LAND GRANTS AND THE CONNECTION
OF SOUTHERN PACIFIC COMPANY THEREWITH.

From about 1884 until 1888 George H. Andrews supervised the land department of the Oregon and California Railroad Company, with headquarters at Portland (Loring, R. V.-2187). In the latter year William H. Mills was appointed land agent of the company (Gov. Ex. 129, R. XI-5765; Minutes 161). He was at this time also land agent of the Central Pacific Company (Casey R. IV-1879), in which po-

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sition he continued, maintaining offices in San Francisco (Eberlein R. V-2230). Andrews remained, however, in active charge of the Portland office, with authority to execute contracts and discharge such other duties in connection with the sale of lands as might be assigned to him by Mills (Gov. Ex. 129; R. XI-5765; Minutes 164). Mills kept in touch with the Portland office by visits thereto and examinations made by his representative, Judge Singer (Loring, R. V-2196).

This method of handling the lands contained until about January 1, 1903 (Loring R. V-2187).

Some time before this a group of financiers headed by E. H. Harriman (Eberlein, R. V-2307) acquired control of the Union Pacific Railroad Company, Southern Pacific Railroad Company and Southern Pacific Company, including the Oregon and California Railroad Company, and thereby formed what is known as the "Harriman System" (Eberlein, R. V-2229, 2298).

About January 1, 1903, Charles W. Eberlein, connected with the land department of the Union Pacific Railroad Company, was given charge, under the supervision of Judge Cornish, vice-president of that company, of the land grants of the Oregon and California Railroad Company, Central Pacific Railroad Company, and Southern Pacific Railroad Company (Eberlein R. V-2229, 2298). He estab-

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lished headquarters at San Francisco. After looking into the land grants of the Oregon and California Railroad Company, he found that Mills had been keeping one set of records with respect to them in San Francisco and Andrews another set in Portland. This led to a serious confusion of accounts (Eberlein R. V-2229), and necessitated a reformation which was undertaken at once and completed in the Fall of 1904. After this all the records were removed from Portland to San Francisco (Eberlein R. V-2234), where they remained under Eberlein's general supervision. One set of men kept the books with reference to all the land grants which he controlled, but the records of the grants of each railroad were kept separate. (Eberlein, R. V-2231, 2234, 2235.)

Mr. Eberlein testified that in 1906 he issued circulars to the effect that he would sell agricultural and grazing lands as soon as applications made could be examined (R. V-2258), but as to the timber lands the company was not in a position to sell, and that he was authorized by Judge Cornish to sell only agricultural and grazing lands (R. V-2331-2). However, the only sale made by him from the time he took charge of the land department in 1903 until the time when he severed his connection therewith in 1908 was to the Southern Pacific Company (R. V-2280).

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In September, 1908, B. A. McAllaster succeeded Eberlein as land commissioner of all the grants (McAllaster, R. IV-1920). His salary was fixed by Judge Cornish and was apportioned among the several companies served, without reference to the services rendered each (McAllaster, R. IV-2003). He took instructions from Judge Cornish and discussed with him the policy to be pursued in handling the lands of the Oregon and California Railroad Company (McAllaster, R. IV-2003, 1977). After the death of Judge Cornish in 1908, McAllaster received his instructions from R. S. Lovett, of the Southern Pacific Company, until 1910; then from Mr. Herrin, general counsel, and to some extent from Mr. Sproule, president of the same company. From the time of becoming land commissioner McAllaster kept his offices in the Flood Building at San Francisco, where the greater portion of the offices of the Southern Pacific Company were located. On the door leading to his office were printed the words, "Southern Pacific Company—Land Department—B. A. McAllaster, Land Commissioner—F. W. Houts, Assistant Land Commissioner" (McAllaster, R. IV-1894, 1895, 1896). (McAllaster says the words "Southern Pacific Company" had been placed there without his knowledge). On the letter heads used in his office were printed the words, "Southern Pacific Company—Land Department" and beneath them these words, "Southern Pacific

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Land Co.—Southern Pacific Railroad Co.—Central Pacific Railway Co.—Oregon & California Railroad Co.—Oregon & California Land Co.—B. A. McAllaster, Land Commissioner—F. W. Houtz, Assistant Land Commissioner—Room 801, Flood Building—San Francisco, Cal.” (McAllaster, R. IV-1985; Gov. Ex. 112; R. XI-5477.)

There were used in his office, he said, other letter heads which contained only the words, “Oregon and California Railroad Company.”

The annual reports of the Southern Pacific Company contain the name of McAllaster as an officer of that company (McAllaster, R. IV-2009).

The question as to how much of the expenses of running McAllaster’s department should be borne by each of the railroad companies concerned was determined by the auditor of the Southern Pacific Company (Adams, R. V-2166, 2167).

The Southern Pacific Company is the operating company of its constituent lines, including the Oregon and California Railroad, and controls substantially all the transportation facilities of Oregon west of the Cascade Mountains and particularly south of Albany. (Eberlein, R. V-2306.)

PATENTED AND UNPATENTED LANDS.

Construction of the first section of twenty miles of the East Side line was finally approved on Janu-

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ary 29, 1870, and the last on November 8, 1889. The first section of twenty miles of the West Side road was accepted and finally approved February 16, 1872, and the last, and only other section, June 23, 1876 (Stip. R. IV-1558).

Pursuant to the rules and regulations of the Department of the Interior all patents to the granted lands were issued upon applications in writing of the Oregon and California Railroad Company as the "successor and assignee" of the East Side and West Side companies, respectively. Each application contained a descriptive list of the lands for which patents were desired and was accompanied by an affidavit, signed and sworn to by the land agent of the defendant Oregon and California Railroad Company, alleging, among other things, that "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands and are of the character contemplated by the granting act," under which patents were applied for (Stip. R. IV-1586).

Under date of May 9, 1871, the first patent was issued covering lands of the East Side grant, and with the exception of Supplemental Patent No. 3, hereinafter referred to, the last patent was issued December 7, 1906. Under date of October 9, 1895, the first patent was issued covering lands of the West side grant and the last on March 20, 1903

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(Gov. Ex. 110; R. X-5374; Stip. R. IV-1577). All of the patents under both the East and West Side grants were issued to the Oregon and California Railroad Company (Gov. Ex. 110; R. X-5374).

That part of the West Side railroad extending from Forest Grove to Astoria was never constructed, and for this reason the granted lands of the West Side grant continuous to such unconstructed railroad were, by act of Congress, approved January 31, 1885, declared forfeited to the United States.

The gross amount of land that has inured to the Oregon and California Railroad Company, under both the East and West Side grants, is 3,182,169.57 acres (Eddy, R. V-2569). Between the years 1871 and 1906 there were patented of the East Side grant 2,745,786.68 acres and between the years 1895 and 1903 there were patented of the West Side grant 128,618.13 acres (Stip. R. IV-1577, 1564).

Put in the form of a table the figures are:

Lands earned under		
both grants		3,182,169.57 acres
Patented under East		
Side grant	2,745,786.68	
Patented under West		
Side grant	128,618.13	2,874,404.81 acres
Total not patented		307,764.76 acres

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Supplemental Patent No. 3, dated June 21, 1909, was issued upon a letter request of A. A. Hoehling, as attorney for the Oregon and California Railroad Company (Def. Ex. 250—R. XI-5767), which set forth a discrepancy in the descriptions of lands included in a patent issued May 29, 1872. To correct this description this supplemental patent was issued (Casey, R. IV-1863). The records of the General Land Office show that this matter was handled in that office by a clerk named Lord, who died prior to the taking of testimony in this case (Casey, R. IV-1866).

LANDS REMAINING UNSOLD AND REVENUE DERIVED FROM
BOTH GRANTS.

A correct description of all the unsold patented lands is given in Exhibit K of the bill (R. I-273, 508) as corrected by Exhibit No. 5 of the answer (R. II-987, 999; Stip. R. IV-1580).

Total unsold lands.....	2,360,492.81
Of which there has been	
patented	2,075,616.45
Unpatented	284,876.36
	<hr/>
	2,360,492.81 2,360,492.81

The reasonable value of these unsold lands exceeds the sum of \$30,000,000 and they are all claimed by the Oregon and California Railroad Company under and by virtue of the East and West Side grants (Stip. R. IV-1580, 1582).

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The net amount received by the Oregon and California Railroad Company from the granted lands, as given by defendants, appears in the following table:

Receipts—

DEFT. EX. 289—R. XIII-6836.

From sales of lands.....	\$4,338,822.53
“ sales of timber on lands.....	18,850.25
STIP. R. IV-1583.	
“ forfeited contracts	88,205.06
“ lease of lands.....	5,532.07
“ timber used by R. R. Co.....	18,850.25
“ timber depredations	10,687.92
ANS.—R. II-915.	
“ interest on contracts.....	1,025,922.89
	<hr/>
	\$5,506,870.97

Disbursements—

DEFT. EX. 289; R. XIII-6836.

To advertising	\$ 34,784.85
“ law expenses	218,415.25
“ grading lands	142,651.40
“ U. S. Surveys.....	145,977.26
“ salaries and office expenses.....	624,344.19
“ stationery and printing.....	18,369.89
“ taxes on lands.....	1,827,776.94
	<hr/>
	\$3,011,776.94

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Total receipts	\$5,506,870.97
“ disbursements	3,011,776.94
<hr/>	
Credit balance	\$2,495,094.03
(Bill prays for forfeiture of unsold lands only.)	

Until about the year 1890 or 1891 there was substantially no demand for the granted lands except for the purpose of settlement or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres and at prices not exceeding \$2.50 an acre, and nearly all sales made prior to the year 1894 were of that character (Stip. R. IV-1584).

In the year 1888 an increased force of cruisers was employed by the land department of the Oregon and California Railroad Company to examine the lands (Loring, R. V-2197). Part of the cruisers' duties was to report on bodies of timber that could be operated together (Loring, R. V-2224). About one-half of the lands had been examined and reported on prior to October 1, 1904 (Loring, R. V-2199). A rapidly increasing demand for the lands in large quantities and at increased prices, commenced about 1889 or 1890 and has continued ever since (Stip., R. IV-1578). Approximately three-fourths of all sales made since 1887 were made by contracts providing for payments of purchase price in from five to ten annual payments and execution

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of conveyances upon final payment. Many of these sale contracts were pending on January 1, 1903, pursuant to which conveyances were issued subsequently and a considerable number of them was still pending when this suit was brought (Stip., R. IV-1579).

At the time the joint and several answer was filed, 740,002.45 acres had been sold and conveyed, and 81,684.31 acres were under contracts of sale (Stip., R. IV-1579). About the same time there remained unsold of the granted lands 2,360,492.81 acres of which, as we have heretofore stated, 2,075,616.45 were patented, and 284,876.36 unpatented (Stip., R. IV-1580).

LAND DISPOSED OF IN QUANTITIES GREATER THAN 160 ACRES
TO ONE PERSON AND AT PRICES IN EXCESS OF \$2.50 PER
ACRE.

On April 15, 1870, the Oregon and California Railroad Company, as we have heretofore stated, conveyed all its lands in trust to certain trustees to secure a bond issue of \$10,950,000 and gave to the trustees the right to sell or dispose of the lands with the consent of the company and apply the proceeds thereof to the payment of the debt. (Govt. Ex. 126-A, R. XI-5530.) Afterwards the trustees and the railroad company united in a conveyance of the lands to the European and Oregon Land Company to be paid for at the agreed price of \$1.25 per acre. (Govt. Ex. 126, I, R. XI-5734.)

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On or about the 2d day of June, 1881, the Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, as trustees, an instrument purporting to convey to said trustees all of the lands of both the East and West Side grants, in trust, to secure the payment of a preferential dividend, and it was made the duty of said trustees or their successors upon certain defaults,

To forthwith proceed to enforce this security, and to sell said rolling stock, equipment and appurtenances to the land and premises comprised herein or then subject to the lien of these persons, in one lot or in more than one lot or parcel and at one time or different times and for cash, or on reasonable credit, payment therefor being secured on the property sold, and otherwise upon such terms and in such manner as said trustees may, in their discretion think best. (Bill R. I-152; Stip. R. IV-1562.)

By mortgage deed dated July 1, 1887 (Ante p. 79), the Oregon and California Railroad Company conveyed to the Union Trust Company all of its unsold granted land, to secure a bond issue and authorized the trustees in case of default,

To cause the whole of the said premises, estates, franchises, roads, privileges and property hereby granted and conveyed * * * to

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be sold at public auction in the city of New York in the state of New York, or in the city of Portland, in the state of Oregon.

Prior to 1894 there was substantially no demand for the lands except for the purpose of settlement and few sales in excessive quantities were made, but after that there were many such sales. (Stip. R. IV-1584, 1578, 1579.)

From 1884 until the lands were withdrawn from sale in 1903, they were sold at the best obtainable price and in quantities as great as the purchaser was willing to buy (Loring, R. V-2208-2223). The company did not require the applicants to state whether they desired the lands for purposes of actual settlement or not (Loring, R. V-2206). When the demand by timber buyers arose about 1894, the railroad company encouraged it (Loring, R. V-2223). The prices were determined at first by Mr. Loring, chief clerk of the land department of the company, and Mr. Andrews. But after the appointment of Mr. Mills as land agent in 1888 (Ante p. 81), the matter of fixing prices was subject to his supervision. These prices were always the highest obtainable and had no reference to those fixed in the grant (Loring, R. V-2216).

From 1894 to 1903 there were many sales of from 1000 to 20,000 acres to one purchaser at prices ranging from \$5.00 to \$40.00 per acre, and there

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was one sale of 45,000 acres at \$7.00 per acre to a single purchaser (Stip., R. IV-1578). Up to 1903, the company had made approximately 5306 sales; of these sales 376 did and 4930 did not, exceed 160 acres to one purchaser, but the 376 sales covered 524,000 acres while the 4930 covered only 296,000 acres (Stip. R. IV-1578). Substantially all of the 524,000 acres were sold to persons who were not actual settlers and who purchased for purposes other than settlement and at prices in excess of \$2.50 per acre. About 478,000 acres of the 524,000 were sold since the year 1897, and approximately 370,000 of the 524,000 acres were sold to 38 purchasers in quantities exceeding 2000 acres to each. The following table is correct:

Total number of sales.....	820,000 acres
Sales not exceeding 160 acres	
to one person.....	296,000
Sales exceeding 160 acres to	
one person and at more	
than \$2.50 per acre.....	524,000
<hr/>	
Total acres sold.....	820,000 acres

Exhibit J, attached to the bill, correctly shows all sales made and their character as to quantity and price. Exhibit 4, attached to the joint answer, purporting to cover the same subject, differs from Exhibit J, but the difference is accounted for by the fact that Exhibit J is based upon executed con-

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veyances while Exhibit 4 is based upon original sales. (Bill R. I-260, Ans. R. II-971, Stip. R. IV-1579.) It is conceded by the defendants that in making sales no attention was paid to the restrictions of the actual settlers provision in the grants of April 10, 1869, and May 4, 1870, and that if those restrictions had been called to the attention of the defendant railroad company at the time the sales were made it would have disregarded them (Fenton, R. V-2369).

COMPANY REFUSED TO SELL.

B. A. McAllaster, Land Commissioner, testified that between September, 1907, and July, 1912, about 10,000 applications to purchase quarter sections of the land at \$2.50 per acre were made to the company and refused (McAllaster, R. IV-1959).

It is stipulated that there were four thousand such applicants between January 1, 1903, and February 14, 1907. In some instances the applicants claimed to be actual settlers upon the lands applied for and in all other cases that they desired the lands for actual settlement. Each applicant stated at the time that he made his application that he was able to pay \$2.50 per acre for the lands applied for and in some instances the tender was actually made (Stip., R. IV-1581).

The refusal of the company to sell was based on the stated claim that the lands were essentially tim-

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ber lands and unsuitable for any other purpose. On January 1, 1903, the company withdrew from sale all the unsold lands (Stip., R. IV-1581).

Approximately 1,800,000 acres of the unsold lands are situated southerly from Eugene, Oregon, and constitute more than one-third in alternate sections, of all lands lying within approximately twenty miles on each side of the company's railroad between that point and the southern boundary of the state (Stip., R. IV-1581).

CHANGE IN FORM OF DEEDS.

Prior to 1892 the Oregon and California Railroad Company used a form of deed containing covenants of warranty (Govt. Ex. 129, R XI-5765; Minutes, p. 248; Singer, R. V-2508). The use of those deeds was discontinued after that time by order of the board of directors and a form adopted which did not contain warranties (Stip., R. IV-1577). The new form of deed, one witness said, was adopted for the purpose of standardizing deed forms and denied that it was intended to anticipate any contention by the Government in this suit (Singer, R. V-2509).

The contracts and deeds executed by the defendant Oregon and California Railroad Company prior to (about) the year 1894 contained (substantially) the following reservation clause:

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Reserving, however, a strip of land one hundred feet wide to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands (Stip., R. IV-1587).

The words,

And also reserving all claim of the United States to the same as mineral lands
were stricken from the contracts and deeds executed by the company between (about) 1894 and 1902; and in contracts and deeds executed after that, the words,

And also reserving and excepting from said described premises so much thereof as may be mineral lands,
were substituted for the words which had been stricken out (Stip., R. IV-1587).

VALUE OF THE PROPERTY COVERED BY UNION TRUST COMPANY MORTGAGE.

The mortgage to the Union Trust Company covers, in addition to the unsold lands, 660 miles of railroad lines and other property of the Oregon and

THE FACTS ESTABLISHED.

California Railroad Company. This road was worth \$50,000 per mile at the time the mortgage was given and is worth more now (Koehler, R. IV-1903-4).

On this basis the property covered by the mortgage, outside of the granted lands, is worth \$33,000,000. The balance due on the mortgage is \$17,745,000 (Stip. R. IV-1575).

The Southern Pacific Company, guarantor of the mortgage deed is financially able to pay the debt secured (Koehler, R. IV-1908).

POSSESSION OF GRANTED LANDS.

The only occupation or possession asserted by the railroad company has been through the cruising and examination of lands, the payment of taxes, contests in land office to defend title, maintenance of fire patrols, the leasing of lands (the highest acreage of leases being 24,671.02 acres), (McAllaster, R. IV-1980, 1984; Eberlein, R. V-2288), issuance of deeds, inspection of reported trespasses and protection of the lands from depredation and waste (Loring, R. V-2203).

REPORTS MADE TO BUREAU OF INTERIOR DEPARTMENT.

The railroad company made reports to a bureau of the Interior Department between 1879 and 1903. These reports show the maximum and average selling price of the lands to be in some instances in excess of \$2.50 an acre (Stip., R. IV-1590, *et seq.*) The

THE FACTS ESTABLISHED.

Bureau Chief transmitted reports annually to the Secretary of the Interior (Stip., R. IV-1612) who, in turn, transmitted them to the President and by him they were laid before Congress where they were referred to appropriate committees and printed as executive documents (Stip., R. IV-1612). It is agreed that the use made by Congress of these reports may be shown by reference to the Congressional Globe and Record and other Congressional reports (Stip., R. IV-1622).

APPROVAL OF TITLE TO BASE LAND.

Certain of the lands sold by the company in violation of the grant as to price and quantity were subsequently deeded by the purchasers to the Government in lieu of other lands received from the Government, in accordance with the provisions of an act approved June 4, 1897. The lands thus deeded are called base lands; those received in their place, lieu lands. Clerks in the Interior Department examined the title to the base lands. At the time of the examinations they had no knowledge of the act of April 10, 1869, or May 4, 1870. The result of their examinations was approved *pro forma* by the Chief of the Forest Lieu Division, Commissioner of the General Land Office and Secretary of the Interior (Stip., R. IV-1885).

THE FACTS ESTABLISHED.**FREE TRANSPORTATION OF PASSENGERS AND FREIGHT FOR
THE GOVERNMENT.**

Defendant shows, by Exhibit 288, that the railroad company furnished to the government free transportation for passengers and freight between 1906 and 1910 of the value of \$315,828.34 (R. XIII-6835). The exhibit shows the amount supplied each year. The volume of free transportation from 1872 to 1906 was approximately the same by years as shown by the exhibit except that prior to 1887 there were few shipments (Sherburn, R. V-2412). The government paid for all transportation of mails on rates based upon weight (Sherburn, R. V-2413). It was also testified that the United States continued to make requests for free transportation up to the date of taking testimony in this case (Sherburne, R. V-2412).

TAXES PAID.

Defendant showed by Mr. Eddy, tax agent of the Southern Pacific Company and Oregon and California Company, that the total amount of taxes paid on the lands was \$2,434,843.33, of which \$1,637,601.69 has been paid since 1905 (Eddy, R. V-2567). From 1874 to 1907 the total amount of taxes paid was \$1,208,833.86 or 58 cents per acre on 2,073,415 acres then owned, and from 1908 to 1911 taxes paid were \$1,266,009.47 or 57 cents an acre on 2,109,927 acres owned during that period. The av-

DISPUTED FACTS.

erage tax paid based on the total grant of 3,182,169.57 acres is 76 cents per acre, of which amount 38 cents per acre has been paid since the institution of this suit. (Eddy, R. V-2569.)

USES OF CONGRESSIONAL RECORDS.

All committee reports and debates in Congress, appearing in the Congressional Globe or Congressional Record, and all other proceedings in Congress published in recognized official reports relating to the enactments of the acts of July 25, 1866; June 25, 1868; April 10, 1869; May 4, 1870; January 31, 1885, and September 29, 1890, are treated as received in evidence subject to the defendants' right to object on the ground of incompetency, irrelevancy and immateriality, except that the objection of incompetency shall not go to the identification of the documents (Stip., R. IV-1623).

DISPUTED FACTS.

The defendants produced the testimony of about 33 witnesses for the purpose of showing that the lands in question are chiefly timbered lands and unfit for actual settlement. To the testimony of each witness upon this subject the complainant objected as incompetent, irrelevant and immaterial. (See Appendix D for page on which testimony of each commences.)

DISPUTED FACTS.

Many of the witnesses called were sent upon the land by the defendants for the purpose of gathering testimony; a few before, many after, the suit was instituted, but all subsequent to the beginning of the agitation for the recovery of the lands. Appendix D contains a table showing (a) name of witness called, his occupation and page of record where his testimony appears; (b) county wherein land testified about is located; (c) area within the county covered by testimony of witnesses; (d) condition of land in natural state; (e) percentage of lands suitable to tillage in natural state and after they have been cleared; (f) suitable to settlement in tracts of a quarter section.

A very small proportion of the witnesses, called by the defendants upon this question, were farmers, most of them were timber men (Appendix D).

Upon the same subject a number of exhibits were also introduced by the defendants (R. VIV-7309, 7310, 7343, 7345). These exhibits consist of written statements made by land cruisers, none of them sworn to, except those prepared by Rees, McLennan, Bruce and McLeod. They show that the land covered by them is largely timbered, but when cleared will be fit for grazing and agricultural purposes. We give a summary of the exhibits in Appendix D.

DISPUTED FACTS.

The percentage of the lands suitable for agricultural purposes ranges from four to sixty per cent in the estimation of the witnesses called by the defendants.

The defendants also offered several exhibits based upon the tax records in the various counties in which the lands are located, for the purpose of showing the acreage of tillable and non-tillable lands. These exhibits refer to the lands actually under cultivation, but do not include those that are, or might be, rendered susceptible to cultivation (Galloway, R. VIII-4263).

Many other exhibits were introduced by the defendants which they claimed bore upon the character of the lands. These exhibits consist, generally speaking, of maps, plats, bulletins, and like documents. They are scattered throughout the printed record. In their effect they do not differ materially from the other exhibits. It would, therefore, serve no useful purpose to attempt a more specific reference to them here.

COMPLAINANTS' WITNESSES ON CHARACTER OF LAND.

The complainants presented 70 witnesses who testified with respect to the land covered by the testimony of the defendants' witnesses. They were chiefly farmers who lived in the neighborhood of the land and were thoroughly familiar with it. There

DISPUTED FACTS.

were 48 of this class. The remainder was made up of timber men and other persons who knew the lands. Forty-five of those who testified said that all of the lands to which their testimony related was capable of settlement; thirteen said that 75 per cent; two that over 80, but under 100 per cent, and the balance fixed it at from 33 to 75 per cent. A statement giving the names of these witnesses and an abstract of their testimony, similar to the one prepared with respect to the defendants' witnesses, is embodied in Appendix E.

OTHER TESTIMONY CONCERNING THE LANDS.

The witnesses for both the defendants and the Government testified with respect to other matters concerning the lands, besides those mentioned above. Here is a summary thereof:

DEFENDANTS' WITNESSES.

1. Value of timber from \$0.75 to \$2.50 per thousand feet board measure.
2. Quantity of timber on quarter section from 4,000,000 to 25,000,000 feet.
3. Cost of clearing from \$50.00 to \$500.00 per acre.
4. Lands acquired under homesteads in timber area generally abandoned, after which the lands passed to timber companies.

DISPUTED FACTS.

5. If the lands had been sold under terms of act of April 10, 1869, title would have passed eventually to timber companies.

GOVERNMENT'S WITNESSES.

1. Value of timber from 50 cents to \$1.00 per thousand feet.

2. Best timber in grant sold. Timber light in many places. Many open places. [Only a portion of the southern part of the grant is timbered].

3. Cost of clearing \$40.00 to \$50.00 per acre. Settler does not hire clearing done but by char-pitting removes the timber by his own labor.

4. Few abandoned homesteads in timbered area.

5. Sale of granted lands in large quantities, to others than actual settlers and withdrawal of lands from market, retarded development of communities in vicinity of the lands.

**THE ALLEGED INFLUENCE WHICH BROUGHT ABOUT THE
PASSAGE OF THE MEMORIAL OF FEBRUARY 14, 1907, BY
THE LEGISLATURE OF OREGON.**

Messrs. Eberlein and Booth testified upon this point. Mr. Eberlein said that, in his opinion, the memorial was instigated by influential politicians for personal interests, but admitted that he had no personal knowledge on the subject (Eberlein, R. V-2378). He attributed the origin of the memorial

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largely to the Booth-Kelly Lumber Company and Booth. Booth denied this responsibility (Booth, R. V-2612). In addition Mr. Dixon said that he appeared before the Public Lands Committee of the House of Representatives and insisted that an amendment be made to the Congressional joint resolution, authorizing the bringing of this suit, to the effect that the titles of all purchasers from the railroad company be confirmed, or else that the resolution should be defeated (Dixon, R. VI-2703).

THE DECREE.

The case was submitted upon the pleadings and the evidence. The court dismissed the cross-complaints and petitions in intervention for want of equity, decreed the unsold lands forfeited, quieted the title thereto in the Government, gave other relief and enjoined the defendants from doing certain acts (R. III-1296).

THE APPEAL.

The defendants, cross-complainants and interveners appealed.

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(An outline of the argument is given in the index (Ante, p. 1).

ARGUMENT—PROPOSITION I.

I.

OPINION OF THE COURT.

The points raised by the demurrers to the bill, the cross-complaints, and the petitions in intervention, covered substantially the entire field of discussion. The trial court, in a written opinion, met and disposed of each (186 Fed. 781).

II.

VESTING OF THE GRANT OF JULY 25, 1866.

Under which will be discussed the question whether the grant under the act of July 25, 1866, is subject to the provisions of the act of April 10, 1869, restricting the manner in which the granted lands might be sold.

The amendatory act of April 10, 1869, contains the provision on which this action is based. It reads:

And provided further that the lands granted by the act aforesaid (meaning the act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding \$2.50 per acre.

It is, therefore, of the first importance to show that the grant in question was received subject to that provision.

The act of July 25, 1866, required the company designated by the Legislature of Oregon as compe-

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tent to receive the grant to file its acceptance of the act within one year from the date thereof. The East Side Company was organized in April, 1867, and designated in October, 1868. Obviously it could not file its assent within one year from the date of the granting act, consequently it applied to Congress for an extension of time. (Ante, p. 50.)

On April 10, 1869, Congress amended the act of July 25, 1866, as above stated, and among its provisions is one extending the time for filing the assent required by that act to one year from the date of the amendatory act.

On June 30, 1869, the East Side Company filed its assent to the act of 1866 in these words:

Accept all the provisions, rights, privileges and franchises of said act of July 25, 1866, and all acts amendatory thereof and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto. (Ante, p. 54.)

Under these circumstances it would seem conclusive that the grant was received subject to the provisions of the amendatory act of 1869. Defendants contend, however, that in reaching this conclusion sufficient effect is not given to the words, "that there be and hereby is granted to said company," appearing in section two of the act of 1866. They

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say these words import a present vesting of the estate and that under the doctrine of relation the estate must be treated as having taken effect in the East Side Company on the date of the act of July 25, 1866. The Government denies this.

(a) **The doctrine of relation does not apply.**

All railroad grants import a present vesting of the estate, but in nearly every one something had to be done after the making of the grant before the estate could actually vest. This gave rise to many disputes in the early administration of the grants, as to when the grants vested, and it became necessary for the courts to establish a rule by which the disputes could be settled. At common law a grant to one not in existence, or not qualified to take, or of lands not identified, at the time of the grant was void for uncertainty. But the Supreme Court held that Congress, being a law making body, was not bound by the common law and could create a valid grant by methods even prohibited by it. (*Rutherford v. Greene*, 15 U. S. 196; *Lessieur v. Price*, 53 U. S. 59). Consequently, it is settled that such grants are valid. But when do they become effective? That depends upon circumstances. If the grantee is capable of taking at the time of the grant, but it is necessary to do something to identify the lands, as for instance, to locate the line of road, the grant does not vest until the identification has been

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made. In contemplation of law, however, it relates back to the date of the granting act. This rule has been adopted for the protection of the grantee against claims of third parties.

In *Barden v. Northern Pacific*, 154 U. S. 288, 313, it was said:

The title attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one.”

In *Van Wyck v. Knevals*, 106 U. S. 360, it was said:

When that route is thus established, the grant takes effect upon the sections by relation as to the date of the act of Congress. In that sense we say that the grant is one *in praesenti*. It cuts off all claims other than those mentioned, to any portion of the lands from the date of the act and passes the title as fully as though the sections had then been capable of identification.

In *United States v. Detroit T. & L. Co.*, 200 U. S. 321, 334, Mr. Justice Brewer, speaking for the court, said:

By the doctrine of relation the patents (under the timber and stone act), when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of

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law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time, is considered to have been done at some antecedent time. It is a doctrine of frequent application designed to promote justice. Thus a sheriff's deed takes effect, not of its date, but at the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass not at the completion of the road, but at the date of the grant.

There are many cases like these, but there is none in which it is held that the vesting of the title goes back to a date before the grantee came into existence, or before it was qualified to take.

In Hall v. Russell, 101 U. S. 503, it was said:

There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently.

Any other rule, it seems to us, would lead to an absurdity. Take the case at bar; to say that the grant to the East Side Company took effect in that company as of the date of the act of July 25, 1866,

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would be equivalent to saying that it took effect before the company was qualified by designation to receive it, even before the company had come into being. This proves too much.

There are other cogent reasons for saying the grant is subject to the provisions of the amendatory act of April, 1869.

(b) Assent was necessary.

The company was incapable of receiving or accepting the grant until it had been designated by the Legislature. The provisions of the act of 1866 make this plain. Section 1 of the act provides that "such company organized under the laws of Oregon as the Legislature of said state shall hereafter designate" shall construct the Oregon portion of the road described in the act. Section 6 provides "that the said companies (which includes the Oregon company) shall file their assent to this act in the Department of the Interior within one year after the passage hereof." Section 8 provides "that in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto, as provided in Section 6 of this act, or by not complying with the same as provided in said section, this act shall be null and void." (Ante, p. 39.) The company regarded this assent as essential for it applied to Congress for an extension of time within which to file it. (Ante, p. 50.) Congress

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took the application under consideration and afterwards granted it in the amendatory act of 1869.

Defendants suggest that they had given their assent by commencing the construction of the road long before the passage of the amendatory act of 1869. Assent could not be given in that way. The act requires the assent to be filed in the Department of the Interior. An oral assent cannot be filed. (Words and Phrases, Vol. 3, p. 2764, Bouvier's Law Dictionary, p. 660.) This we may remark, in passing, is in accordance with the construction adopted by the company for, as we have seen, it filed a written assent.

(c) **The legal function of an assent.**

An assent implies an acceptance of a proposal. In *State v. B. & O. R. R. Co.*, 12 Gill & J. 399, 433, the court held that where an act authorized the construction of a railroad and required it to assent to certain provisions of the law, the term is one peculiarly appropriate to contracts, and then observed:

The assent of the company was essential to give to the law a binding and obligatory force; the principle being well settled that an act or charter of incorporation is nothing more than an offer until consummated by acceptance.

(*Canal Company v. B. & O.*, 4 Gill & J. 1, 130; *Fuller v. Kemp*, 16 N. Y. S. 158, 160; *Baker v. Johnson County*, 37 Iowa, 186, 189.)

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The first act required by Congress from the grantee company was the filing of its assent. Until that had been done it could not be known that the company accepted the grant upon the conditions named. It was the means provided by Congress for evidencing the meeting of the minds of the grantor and grantee. The grant was an offer and, of course, could not become effective until accepted. *Rogers v. Railroad Company*, 45 Mich. 460, 468, is a case in point. Congress by the act of June 3, 1856, granted lands to Michigan to aid in the construction of railroads. The Legislature of the state in turn granted lands to certain railroad companies by an act which said, *inter alia*, that the lands “are hereby disposed of, granted to, conferred upon and vested in” the railroad companies named. It also provided for an acceptance and said, “in such acceptance each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the Secretary of State of Michigan within sixty days from the passage of this act.” The railroad companies did not file an acceptance, and the court was asked to determine the effect of the failure. It said:

So far as the claim is concerned that these companies without acceptance obtained titles in fee, we think it has no legal basis.
Again,

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This acceptance was the only act whereby any of these companies were brought into contract relations with the state at all. The law did not assume to force the grant upon any company, and the contract could not bind either party until both assented to the same agreements and conditions.

(To the same effect are: 9 A. & E. Enc. of Law, 2 Ed. 161, and cases cited; Herbert, et al. v. Herbert, 1 Ill. 278, 282; Woodbury, et al. v. Fisher, et al., 20 Ind. 387, 389; Bremmerman, et al. v. Jennings, et al., 100 Ind. 253, 256; Maynard v. Maynard, 10 Mass. 455, 457; Jackson v. Phipps, 12 Johns. N. Y. 418, 421; Comer v. Baldwin, 16 Minn. 172, 175; Owens v. Miller, 29 Md. 144, 159; M'Gehee v. White, 31 Miss. 41, 46; Corbett v. Norcross, 35 N. H. 99, 110; Moore v. Flynn, 135 Ill. 74, 79.)

(d) Acceptance of the grant in the manner provided by the granting act was essential.

It is admitted by the defendants that the East Side Company did not *file* its assent within a year after the passage of the act of 1866, but it is contended by them that it had given its assent in some other way. Even if this be true, it would not be sufficient. The act of 1866 was not only a conveyance, but also a law. In *Schulenberg v. Harriman*, 88 U. S. 44, Mr. Justice Field, speaking for the court, said:

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A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the Legislature requires. (Missouri v. Kansas Pacific, 97 U. S. 491; United States v. Southern Pacific, 146 U. S. 570.)

Therefore, the manner in which the assent was to be given, having been fixed by statute, could not be disregarded without violating the law.

United States Bank v. Dandridge, 12 Wheat., 64, relied upon by defendants, is not opposed to this view. That case decided that acts of a corporation are not “invalid merely from the omission to have them reduced to writing,” but added,

Unless the statute creating it makes such writing indispensable as evidence or to give them obligatory force. *If the statute imposes such a restriction, it must be obeyed.* (p. 69.) Again,

If, in the present case, the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be deemed for any purpose in office until such approval, the consequences contended for would have followed. His acts would have been *utterly void* and any unrecorded vote of approval nugatory. (p. 87.) (Italics ours.)

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St. Paul, etc., Railway Co. v. Greenalgh, 139 U. S., 19, is another case which defendants claim supports their contention. The question decided there arose in this wise: Congress had granted lands to the State of Minnesota to aid in the construction of railroads. One of the roads failed to complete construction within the time prescribed. Congress extended the time but upon conditions

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or other such persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

The act required the railroad company to file an acceptance of these conditions. There was no evidence that it had done so, but it had received all the benefits of the act, and in view of this the court held:

It will be considered, in the absence of proof to the contrary, as having in fact accepted the conditions imposed, and relinquished all claim to the lands thus settled upon and occupied.

Because,

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It would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to void forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

The decision was in effect that where the beneficiaries of a grant obtain all the benefits thereof they are estopped from denying that they had assented to the terms of the grant—had assented how? Clearly in the manner provided by the act. That case gives no countenance to the contention of defendants.

(e) **Mutual Construction of Provisions requiring Filing of an Assent.**

If an instrument is of doubtful meaning the construction given it by the parties themselves, as shown by their acts and omissions, particularly at or about the time of its execution will be deemed to be the true one, unless the contrary be clearly shown. (*Irwin v. United States*, 57 U. S. 513; *Dakin v. Savage*, 172 Mass. 23.)

Considering the conduct of the parties here, how did they construe the provision with respect to the filing of the assent?

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The East Side Company made application to Congress for an extension of the time within which to file its assent. When this application was pending Senator Williams of Oregon, favoring the extension of time, procured from the Secretary of the Interior his views on the subject. After setting forth the history of the subject in his letter, the Secretary said:

I have the honor to state that as the matter now stands that the grant, so far as the portion in Oregon is concerned, has lapsed * * * and some legislation of Congress is necessary to revive the grant for the Oregon portion of the road. The proposed bill, if it becomes a law, will in my opinion accomplish that purpose.

(Ante, p. 52.)

The bill referred to was what subsequently became the amendatory act of 1869. Congress, when it passed that act extending the time for filing the assent, must have deemed it important, for it will not do to say that it purposely did an unnecessary thing.

During the same time the West Side Company proceeded on the assumption that assent was necessary; it resisted the extension on the theory that if it was not granted the East Side Company could acquire no rights under the grant of 1866. We have

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then the East Side Company, the West Side Company, the Congress of the United States and the Secretary of the Interior all agreeing in the view that a written assent had to be filed within the time fixed in the grant. Shall the East Side Company be now heard to say that they were all mistaken. Shall it be heard to say that the requirement of an act passed at its request, and largely through its procurement, was unnecessary and does not mean what it says.

(f) Is the Provision with respect to the Filing of an Assent a Condition Precedent or Subsequent?

It was urged by defendants that the filing of an assent was a condition subsequent. This they based upon the 8th provision of the act of 1866 to the effect that upon failure to file the assent the lands unpatented "shall revert" to the United States. The phrase "shall revert" they say implies that the title vested in the grantee before the assent was given. This assumes too much. That the title passed out of the United States the moment the act was passed may be conceded, but this is far from admitting that at the same time it took lodgement in the company. It became in the language of the Supreme Court "a float" (*Railroad v. Freemont*, 76 U. S. 89) and did not and could not find a resting place until the companies, contemplated by the granting act, had qualified themselves to become its recipient.

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When we consider the function of an assent it is obvious that the giving of it was intended to precede the vesting of the estate. In *Finlay v. King*, 3 Pet. 346, 374, it was said:

There are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent * * * if the language of the particular clause, or of the whole will, show that the act on which the estate depends, must be performed before the estate can vest, the condition is, of course, precedent; and unless it be performed the devisee can take nothing.

Whether a condition in a deed is precedent or subsequent is always a question of the intention of the parties.

(*Rannels v. Rowe*, 145 Fed. 296; *Jones v. C. & O. R. R. Co.*, 14 W. Va. 514; *Carloss v. Oxford*, 72 Ark. 310; *Washburn on Real Property*, Vol. 2, Sec. 941.)

No one can doubt, it seems to us, after reading the act of 1866, that it was the intention of Congress that the assent should precede the vesting of the estate.

(g) The title was in the **East Side Company** until it renounced it in 1870.

Congress empowered the Legislative Assembly of Oregon to designate a company organized under

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the laws of Oregon to be the recipient of the grant. Pursuant to this power the Assembly designated the West Side Company. This exercise of the power exhausted it (31 Cyc. 1053). When, therefore, the Legislature attempted to designate the East Side Company in October, 1868, as a substitute for the West Side Company it was without power to do so. From this it follows that the East Side Company was not legally designated before the passage of the Act of 1869 and therefore did not acquire any rights, under the grant, prior to that time.

If it be urged that the West Side Company was not completely organized at the time of its designation, that would not be sufficient to render nugatory the designation. It had taken steps to become a corporation prior to its designation, completed its organization in May, 1867, filed its assent in the following July, and was subsequently recognized by the Department of the Interior (Ante, p. 42, *et seq.*) Thus it became qualified to receive the grant before its designation had been revoked and before the East Side Company had been selected.

In *Rotch's Wharf Company v. Judd* (108 Mass. 227) it was contended that a deed to a corporation was void because the corporation was not organized at the date of the deed. The Court held that upon the completion of its organization it was competent to accept the deed and that it had done so.

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Assuming that the West Side Company did not receive the grant because the company had not been properly organized, how does the East Side Company stand in that respect.

In *Holladay v. Elliott*, 8 Ore. 85-91, we read:

In this case the attempted organization of the O. C. R. R. Co. (the East Side Company) amounted to nothing. It was absolutely void. Nor did the joint resolution of the Legislative Assembly, adopted October 20, 1868, recognizing this corporation as the one entitled to receive the land granted by Act of Congress, to aid in the construction of a railroad, cure the inherent defects of its organization. It had no power to legally transact any business, nor to accept or hold the lands so granted.

The Court in that case was construing a state statute and its decision is binding on this court.

Before this the company had become involved in litigation with respect to the right to use its name, Oregon Central Railroad Company, the contention being that the West Side Company had appropriated that name before the East Side Company was organized. (*Newby v. Oregon Central Railroad Company, et al.*, Fed. Cas. 10144.)

Indeed the East Side Company may be said to have recognized its own invalidity, for on March 17, 1870, its promoters formed a new corporation under

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the name of the Oregon and California Railroad Company, defendant herein. On the 29th of March following, a general conveyance was made by the East Side Company of all its property and franchises to the new corporation, and on the same day, the East Side Company was dissolved (Ante, p. 61). From the foregoing it follows that the East Side Company was not qualified to receive the grant prior to 1869.

(h) **Oregon and California Railroad Company Estopped.**

The East Side Company, predecessor of the Oregon and California Company, as we have seen, requested Congress to pass the Act of 1869. On June 8, 1869, its board of directors adopted a resolution wherein it said:

This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges and franchises of such act of July 25, 1866, * * * and of all acts amendatory thereof upon the conditions therein specified and do hereby give our assent and the assent of such company thereto (Ante, p. 53).

This necessarily included the Act of 1869. On July 30, same year, a copy of this resolution was filed in the office of the Secretary of the Interior.

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March 17, 1870, the Oregon and California Railroad Company, in its articles of incorporation, recognized the binding force of the Act of 1869. March 29, 1870, the East Side Company conveyed all its property and franchises to the new corporation and was formally dissolved. April 4, following, the new corporation, through its board of directors, adopted a resolution assenting to the terms of the act of 1866 "and amendments thereto," which necessarily included the Act of 1869. On April 28, 1870, the new corporation filed in the office of the Secretary of the Interior certified copies of its assent and of the general conveyances from the East Side Company and from that time has been recognized by the Department of the Interior as the *successor* of the East Side Company. (Ante, p. 61).

In connection with the foregoing, consider that on January 29, 1869, the Secretary of the Interior decided that "the grant, so far as the road in Oregon is concerned, has lapsed * * * and some legislation by Congress is necessary to revive the grant," and, he added, "the proposed bill," meaning the one which eventually became the amendatory Act of 1869, "will, in my opinion, accomplish that purpose." (Ante, p. 51.) From this it is clear that the Department of the Interior would not have recognized the East Side Company as entitled to the grant if the Act of 1869 had not been passed, or, if passed, the company had not assented to it. By

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assenting, the company received the benefits of the act without contest. May it now be heard to say that the assent was unnecessary and therefore not binding upon it? We think not. (Bigelow on Estoppel, pp. 354-364; *Spriggs v. Bank*, 10 Pet. 257, 265; *Goddard v. Dakin*, 51 Mass. 94; *Johnson v. Thompson*, 129 Mass. 398; *Parkinson v. Sherman*, 74 N. Y. 88.)

In *State v. Portland General Electric Co.*, 95 Pac., 722, 732, the doctrine of estoppel was applied to facts quite analagous to those in the case at bar. The Court held that when a corporate franchise is based upon several enactments, some passed at one time and some at another, and the later ones impose additional terms and conditions, which the beneficiary of the franchise acquiesces in or recognizes, it, the beneficiary, will be estopped from contending that it became vested with the franchise prior to, and therefore independent of, the later enactments. In that case acquiescences was established only by implication; in this case by written declarations.

Is there anything in the case of *Bybee v. O. & C. R. R. Co.*, 139 U. S. 663, 684, against this? In that case the company secured nothing from Bybee through its recognition of his alleged title. Estoppel rests upon equitable grounds. There was no equity estopping the company from denying his right.

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(i) In the act of July 25, 1866, Congress reserved the power to amend the grant, and afterwards exercised this power at the request of the East Side Company.

Section 12 of the Act of July 25, 1866, reads:

“That Congress may at any time, having due regard for the rights of said California and Oregon Railroad Companies, add to, alter, amend, or repeal this act.

Pursuant to this, Congress passed the amendatory Act of April 10, 1869. Did the East Side Company have any right with respect to which Congress was bound to have “due regard” at the time of the passage of that act? We have already shown that it had not. But whether it had or not, the East Side Company cannot now be heard to say that the amendment is not binding. It applied to Congress and represented that it had no rights under the grant and could acquire none until Congress permitted it to do so, by extending the time for filing its assent. The amendment was, therefore, consented to by the company.

With the consent of the corporation, the legislature may make any change in the charter. This consent may be shown by the corporation asking for the amendment, or expressly accepting one made without request, or by acting upon or acquiescing in one enacted without request. (8 Cyc. 964.)

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CERTAIN CONTENTIONS BY DEFENDANTS NOT NOTICED
ABOVE.

(1) On June 25, 1868 (Ante, p. 47), Congress passed an act extending the time for the completion of the first twenty miles of the road from one year to eighteen months. Defendants urge that by this act Congress waived the filing of the assent required by the act of July 25, 1866. There is nothing in its terms to warrant such a contention.

(2) It was also insisted that the provisions of the amendatory act of 1869, which reads, "that nothing herein shall impair any rights heretofore acquired by any railroad company under said act," shows an intention on the part of Congress not to insist upon the other provision requiring the lands to be sold to actual settlers in limited quantities. Of course, the provision has no such meaning. At the time of the passage of the amendatory act there was a controversy between the West Side Company and the East Side Company, as we have already seen. Congress did not desire to settle that controversy and, hence, incorporated the provision in question. To argue that this provision nullifies the one with respect to the sale of the lands, is pushing the contention a little bit too far.

(3) It was also contended that in the bills of complaint and stipulations of fact in certain former suits, involving the grant of 1866, the Attorney-Gen-

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eral recognized the East Side Company as having become vested with the grant prior to the act of 1869. These papers do not appear in the printed record, but if they should be referred to they will show that the question as to whether the grant of 1866 was subject to the provisions of the act of 1869, was not involved in the slightest degree. The stipulations were prepared by the attorneys for the defendants and principally upon the stationery of one of the attorneys for the defendants in the case at bar. The bills of complaint did not allege the time when the Oregon Central Railroad became entitled to the benefits of the act of 1866; they simply alleged that it did not become entitled to them. But the attorneys for defendants, in preparing the stipulations, inserted therein the statement "and prior to the year 1869 the said company duly became entitled to all the benefits, privileges and grants in the State of Oregon mentioned in or offered by the said act of Congress."

These stipulations were made many years ago, when there was nothing to direct the attention of the Attorney-General to the importance of the exact time of the vesting of the grant in the East Side Company. The Attorney-General did not have in mind, and could not have had in mind, the question of the validity or binding force of the provisions of the act of 1869. The attorneys for the railroad company have had that question very seriously in mind

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for many years. Besides each of these stipulations is expressly limited to "the purposes of this suit." They have no weight in the case at bar.

(4) Another contention urged was, that the filing of an assent by either the California or the Oregon company was a sufficient compliance with the act.

The language of the act refutes this. Section 6 says, "that the said companies shall file *their* assent to this act." Section 8 provides "that in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing *their* assent thereto, * * * this act shall be null and void." (Ante, p. 40.) "Their assent" does not mean its assent.

(5) Another contention was that the Oregon and California Railroad Company had acquired the rights of the West Side Company in the East Side Company grant, by the general conveyances of the West Side Company on October 6, 1880. This is on the assumption that the West Side Company had some right in the East Side grant, but the suggestion is completely answered by the fact that the West Side Company waived all claim to the East Side grant before it had earned an acre of land thereunder, and in lieu thereof applied applied for, received and accepted the West Side grant (Ante, p. 55).

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We submit in conclusion upon this point that the East Side Company must be held to have received the grant subject to all the obligations and restrictions of the act of April 10, 1869.

III.

CONSTRUCTION OF ACTUAL SETTLERS' PROVISION.

Under which will be discussed the meaning and legal effect of the provision of the act of April 10, 1869, restricting the manner in which the granted lands might be sold; the Government contending that it is a condition subsequent, the defendants contending that it is an "unenforceable, directive, regulative covenant," and the cross-complainants and intervenors contending that it establishes a method by which individual citizens may acquire an enforceable right to purchase the lands.

Before entering upon an examination of the provisions of the act of 1869, we think it proper to recall to the mind of the court certain pertinent rules of construction.

RULES OF CONSTRUCTION.

(1) We have heretofore alluded to the principle that an act of Congress making a grant is more than a mere conveyance. It is a law as well. An additional word upon this topic may not be amiss. In *Missouri, etc., R. Co. v. Kansas Pacific*, 97 U. S. 491, 497, it was said:

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It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.

(Schulenberg v. Harriman, 21 Wall. 44; Hall v. Russell, 101 U. S. 503; Winona v. Barney, 113 U. S. 618; Kansas, etc., v. Dunmeyer, 113 U. S. 629; United States v. Southern Pacific, 146 U. S. 570; St. Paul, etc., v. Greenalgh, 26 Fed. 563.)

The act in question being a law must be enforced as written, if possible. It should not be impaired or minimized in any wise by construction. All parts should be given effect, unless they be in irreconcilable conflict.

(2) In construing public grants, such as the one under consideration, all doubts must be resolved in favor of the grantor.

In Winona v. Barney, 113 U. S. 618, 625, it was said that public grants should

receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance.

In Oates v. National Bank, 100 U. S. 239, 244, it was observed,

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We ought rather, adopting the language of Lord Hale, to be “curious and subtle to invent reasons and means” to carry out the clear intent of the lawmaking power when thus expressed.

The law favors that construction which will give effect to every part. In *Bird v. United States*, 187 U. S. 118, 124, it was said:

There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.

In 26 Am. & E. Ency. of Law, Vol. 26, p. 618, it is said:

That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect.

The rule for which we contend is reasonable. When the good of the public comes into conflict with the good of the individual the latter must yield. But it is not necessary for us to press the rule that far in this case; because, as we view it, the terms of the grant are plain. If the rule is to have any application here it would be to prevent the resolving

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of doubts against the Government. An enforcement of the clear meaning of the statute is all we ask for.

(3) The principle applicable to private conveyances, that forfeitures are disfavored by law and should be avoided wherever possible, has no application. (*Rutherford v. Greene*, 15 U. S. 196; *Wilkinson v. Leland*, 27 U. S. 627, 662; *Rice v. Railroad Company*, 66 U. S. 358; *Schulenberg v. Harriman*, 88 U. S. 44; *Missouri v. Kansas*, 97 U. S. 491, 497; *St. Paul v. Northern Pacific*, 139 U. S. 1.)

(4) The language of the act must be permitted to control, unless the plain meaning thereof leads to results so absurd as to force the conviction that Congress could not have intended them.

In *United States v. Goldenberg*, 168 U. S. 95, 102, it is said:

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislator.

In *Kohlsaat v. Murphy*, 96 U. S. 153, 160, we read:

Whenever the intention of the Legislature can be discovered from the words employed, in

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view of the subject matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the Legislature except when the language employed will admit of no other signification.

(5) Rules of statutory construction are employed to resolve, but never to create, doubts. (Hamilton v. Rathbone, 175 U. S. 414; McCluskey v. Cromwell, 11 N. Y. 601; Lewis' Sutherland Statutory Construction, Vol. 2, pp. 698-702, and cases cited.)

Having in mind the foregoing principles, we proceed to a consideration of the act of 1869.

First. THE LANGUAGE OF THE PROVISION.

For the purpose of bringing again to the attention of the court the plain, unmistakable language of the proviso of the amendatory act of 1869, we quote it:

Provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre.

Hereafter we shall speak of this proviso as the "actual settlers' provision." Nothing could be freer from doubt than the language of this provision.

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Congress made it as clear as words could, that it intended the granted lands to be sold to actual settlers, in quantities not exceeding 160 acres to one purchaser, and for a price not exceeding \$2.50 per acre.

DEFENDANTS' INTERPRETATION.

The defendants contend that the phrase "actual settlers" means settlers who *cultivate* the land, and that if the land is not susceptible of cultivation, the actual settlers provision does not apply. This is too narrow a view. To be a settler on land does not necessarily imply cultivation of the land. There are old settlers associations in almost every city in the West, composed of persons who never tilled a foot of the soil on which they had settled, yet they are actual settlers. No one would think of denying it. This is a matter of common knowledge and the court will take notice of it. Persons might settle upon these lands and use them for any purpose to which they were susceptible whether it be pasturing, growing an orchard or the cultivation of the soil for the purpose of raising grain. The test is actual settlement upon the land without reference to any other use that may be made of it. Congress desired to populate the country. That accomplished, it was willing to let the inhabitants select the uses to which they would put the lands.

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Moreover, when Congress desired to condition the enjoyment of land upon the cultivation thereof, it said so. In the preemption act of 1830 (4 Stat. 420) it conferred the bounty upon those who were in possession and *cultivated* a part of the land. In the act of 1841 (5 Stat. 543) the gift was made to those who inhabited and *improved* the land. In the act of 1850 (9 Stat. L. 496) it gave the land upon condition that the occupant continued to reside thereon and *cultivate* it. In the homestead act of 1862 it required actual settlement *and cultivation* (12 Stat. L. 302). "The essential conditions of a preemption are actual entry upon, residence in a dwelling and improvement and *cultivation* of a tract of land" (Donaldson's Public Domain, 214). Thus we see that the phrase "possession," "settlement" and "residence" were never understood by Congress to include cultivation. When it required cultivation it used the word "*cultivation*" in addition to the foregoing words. It did not use it in the act either of 1869 or 1870 which we are considering and, therefore, we are justified in concluding that it did not intend to require cultivation.

It is suggested that actual settlers within the meaning of the act contemplates those actually on the land at the time of the vesting of the grant. This, of course, is incorrect. The grant must be construed as a whole. Turning to it we find that

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in section 2 it makes special provisions with respect to those who might be upon the land at the time of the grant. We read:

“And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands designated, as aforesaid, shall be selected by said companies in lieu thereof under the direction of the Secretary of the Interior in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections.” (Ante, p. 36.)

This shows that it was not intended to include in the grants any lands upon which there were actual settlers, consequently the phrase “actual settlers” does not refer to those actually on the lands at the time the grants were made. This being so, the phrase must be treated in a prospective sense. It means persons selected by the grantees who shall purchase with the *bona fide* intention of actually settling upon the land.

The difficulty, if any exists, is with respect to the remedy which the Government would have in the event that the grantee failed to conform to the Congressional purpose.

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Does this provision constitute a covenant, a trust, an offer which any one may accept, or a condition subsequent?

Before entering upon a discussion of these questions we will try to ascertain what, if any, policy the Government had with respect to the disposition of the public domain at the time the amendatory act of 1869 was passed.

Second. THE GENERAL POLICY OF CONGRESS WITH RESPECT TO GRANTS OF THE PUBLIC DOMAIN CONSIDERED.

By what means are we to ascertain this policy?

(a) Congressional debates, other historical facts and acts *in pari materia* may be considered.

Whenever there is doubt touching the meaning of any document the circumstances leading up to its execution may be considered as aids in solving the doubts; they act as side-lights. So it is in case of legislation. Acts *in pari materia* and other historical facts bearing upon the legislation may be considered.

In *United States v. Union Pacific*, 91 U. S. 72, 79, the court said:

Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provisions in it.

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In *Platt v. Union Pacific*, 99 U. S. 48, 64, following the rule in *United States v. Union Pacific*, *supra*, the court said:

In endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purposes from the language used in connection with the attending circumstances.

In *Smith v. Townsend*, 148 U. S. 490, 494, the court said:

It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy.

In *Mobile and Ohio R. R. Co. v. Tennessee*, 153 U. S. 486, 502), the court said:

Legislative contracts especially should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made rather than at a later period when different ideas and theories may prevail.

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It is equally true that the purposes of an enactment should not be confused with ideas and theories which may have prevailed at an earlier period; as, for instance, defendants in the case at bar seek to test the meaning of the act of April 10, 1869, by the purposes and policies which actuated Congress at the time of the enactment of the Pacific railroads bill on July 1, 1862.

(Preston v. Browder, 14 U. S. 115, 121; Wolcott v. Des Moines, 72 U. S. 681; Texas & Pacific v. Interstate Commerce Commission, 162 U. S. 197, 210; Hamilton v. Rathbone, 175 U. S. 414; Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 245; Lewis' Sutherland Statutory Construction, Vol. 2, p. 883, *et seq.*, and cases cited.)

Under the category of historical facts and circumstances surrounding legislation fall debates in Congress. The views of one member, or even a number of members, should not have any influence in expounding the law. But if substantially all who spoke upon a pending measure agree with respect to the reason for its passage that would tend to show the purpose of the act, where the language used admitted of more than one meaning.

In *Jennison v. Kirk*, 98 U. S. 453, 459, the court referred to the remarks of a Senator, made in urging the passage of the bill, and said:

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These statements of the author of the act in advocating its adoption cannot, of course, control its construction where there is doubt as to its meaning; but they * * * serve to indicate the probable intention of Congress in the passage of the act.

In *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 473, construing the tariff law, the court said:

While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount.

In *Holy Trinity Church v. United States*, 143 U. S. 457, 464, the court gave weight to the reports of the Congressional committees upon the legislation under review, saying:

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each House, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor (p. 465).

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It will be remembered that the question before the court in that case was whether or not a contract made with a minister of the gospel came within the provisions of the act prohibiting contract labor, and it was held that in the light of the circumstances surrounding the legislation, much of which was found in the debates, it was not the intention of Congress to prohibit such contracts.

In *Binns v. United States*, 194 U. S. 486, 495, the court said:

While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (*United States v. Freight Association*, 166 U. S. 290, 318), yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports.

In *Blake v. National City Bank*, 90 U. S. 307, it was said:

Under these circumstances, we are compelled to ascertain the legislative intention by recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records.

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If it be said that this decision is in conflict with the decision in *Aldrich v. Williams*, 44 U. S. 24, in which it was decided that the construction placed upon the act by individual members of Congress in the debates which took place at the time of its passage would not be permitted to influence in any degree the judgment of the court with respect to its meaning, we say that a distinction must be marked between what individual members of Congress said and what was the general trend of the opinion expressed by members participating in the debate.

(The following cases support the foregoing: *United States v. Freight Association*, 166 U. S. 290, 318; *Downs v. Bidwell*, 182 U. S. 244, 254; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 40; *Collector v. Richards*, 90 U. S. 246, 258; *Dunlap v. United States*, 173 U. S. 65, 75; *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 245.)

(b) **Early public land acts.**

The Government at first looked upon its public lands as means of raising revenue and managed them with a view to that end. Consequently for many years it authorized sales of large tracts, without any reference to the number of acres which any one person might purchase, but solely for the purpose of getting the largest amount of money possible out of them. There was no general land law. Whenever the Government desired to dispose of lands

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within any particular area, it passed an act authorizing it to be done. The effect of this was to encourage speculation in, rather than actual settlement of, the public lands. A minimum price was fixed and the lands put up at public auction. Where the lands were not sold it was provided that they should not again be offered for sale, but should be subject to private sale at the minimum price fixed. There was nothing in these acts to encourage settlers to go upon the lands and establish homes. Notwithstanding this the lands were taken up by many, settlements were made, fields cultivated and homes established. Those who did this naturally sought means by which to secure to themselves the lands thus taken up. The matter was brought to Congress and it was compelled to take action for the protection of such settlers. In 1830 an act was passed wherein it was provided:

That every settler or occupant of the public lands prior to the passage of this act, who is now in possession and cultivating any part thereof in the year 1829, shall be, and he is hereby, authorized to enter * * * any number of acres, not more than 160, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land. (4 Stat., 420, 421.)

On April 5, 1832, another statute was passed declaring that,

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All actual settlers, being housekeepers, upon the public lands, shall have the right of pre-emption to enter, within six months after the passage of this act, not exceeding the quantity of one-half quarter section. (4 Stat., 503.)

Experience soon developed the defects of the first public land system. The system obstructed and discouraged the settlement of the public domain. Congress soon began to correct this. But for forty years its efforts were of limited application, and afforded only partial relief. From 1801 to 1841 no less than thirty laws were passed extending the time of payment, waiving interest, and otherwise extending temporary relief to those who had settled upon the public domain. The system of survey was reformed, so as to permit the offering of the lands in smaller tracts, within the means of settlers. (Donaldson's Public Domain, 205.)

(c) **Beginning of the pre-emption system.**

Beginning with 1826 it became the practice to provide in all acts opening lands for sale that persons who had settled thereupon prior to a certain date named in the act should have a preference right to purchase the lands settled upon, to a limited quantity, usually 160 acres, at the minimum price established by Congress.

The public land question was the subject of frequent debates in Congress from 1830 to 1841. The

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celebrated debate between Webster and Hayne related to "Foot's resolution," touching the distribution of the public lands. During that debate Mr. Webster, on January 26, 1830, observed with respect to the public lands:

What I have said and what I do say is, that they are a common fund, to be disposed of for the common benefit, to be sold at low prices for the accommodation of settlers, keeping the object of settling the lands as much in view as that of receiving money from them. (Writings and Speeches of Daniel Webster, Vol. VI, p. 21, Ed. 1903, Little, Brown & Company, publishers.)

In 1839 he said:

As to donations to actual settlers, I have often expressed the opinion, and still entertain it, that it would have been a wise policy of government from the first to make a donation of a half or whole quarter section to every actual settler, the head of a family, upon condition of habitation and cultivation. (Writings and Speeches of Daniel Webster, Vol. VIII, p. 263, Ed. 1903, Little, Brown & Company, publishers.)

As a result of this discussion the Senate committee, of which Henry Clay was chairman, recommended for passage a measure which became known as the "Distribution bill." It became a law in 1841,

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and contained the first general pre-emption law. (5 Stat., 453.) It worked a reversal of the former public land policy. Under it actual settlers became a privileged class, and settlement of the public land was not only permitted, but invited.

In *Johnson v. Towsley*, 80 U. S. 72, 88, may be found an historical account of the influences leading to the adoption of this act. Sentiment in favor of the pre-emption law grew rapidly. In 1849 a new executive department was created for the administration of the public lands; it was called the "Home Department." This is significant. The pre-emption law became and remained a Congressional favorite. In 1853 and 1855 laws were enacted extending the right to unsurveyed lands in certain states, including the State of Oregon; and later this privilege was made general throughout the United States. The policy which treated the public domain as a source of revenue only was fading fast, and in its stead was coming the new and more enlightened policy which dedicated it to homes for the people.

In 1850 donation laws were passed by which settlers were given, free of cost, from 320 to 640 acres, in certain states, including Oregon (then a territory).

On August 4, 1854, an act was passed graduating the price for which "offered" lands which had been in the market and remained unsold for ten years or

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more. This was for the benefit of actual settlers only. (10 Stat., 574.)

In 1852 the platform of the Free Soil party declared:

That the public lands of the United States belong to the people, and should not be sold to individuals, nor granted to corporations, but should be held as a sacred trust for the benefit of the people, and should be granted in limited quantities, free of cost, to landless settlers. (History of the Presidency, Stanwood, Vol. 1, p. 255.)

In 1860 the public demand for a homestead law had become so general that all political parties favored it. Upon his election President Lincoln urged the immediate passage of such a law. It was passed, and by him approved May 20, 1862. It donated not exceeding 160 acres, free of cost, to those who would establish a home, reside upon and cultivate the same for a period of five years. (12 Stat., 392.)

In December, 1865, President Johnson in his annual message said:

The homestead policy was established only after long and earnest resistance. Experience proves its wisdom. The lands in the hands of industrious settlers, whose labor creates wealth

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and contributes to the public resources, are worth more to the United States than if they had been reserved as a solitude for future purchasers.” (Richardson’s Messages and Papers of the Presidents, Vol. VI, p. 362.)

The foregoing shows the trend of the public mind towards reserving the public lands for actual settlers.

(d) **Grants to railroads and other internal improvements.**

From 1802 to 1828 the right of Congress to make grants in aid of internal improvements was strenuously contested. The first grant was to Ohio in 1823 (3 Stat., 727), to aid in the construction of a wagon road in that state, and the last to the Texas Pacific Railroad, by act of March 3, 1871 (16 Stat., 473). The early grants were in aid of construction of canals, river improvements and wagon roads. It is not practical to review these grants in detail (we give a classified list of them in Appendix A).

A careful examination of the statutes just referred to will show that Congress never made grants in aid of canals, river improvements, wagon-roads or railroads, except on the theory that such improvements would result in the settlement of the lands tributary thereto. The construction of the improvements was not itself the object of any of these grants. It was but a means to an end, namely, the

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settlement of the public domain. A statute giving land to the Pacific Railroad in 1862, and all railroad grants, expressly excepted mineral lands. The policy of limiting railroad grants to agricultural lands indicates that it was contemplated by Congress, even if not expressed, that the lands should be sold to actual settlers.

After the Illinois Central Railroad grant, with one exception in Alabama, all grants have been for the odd numbered sections. One object of this was to enable the Government to share in the benefits resulting from the construction of the improvement, and by doubling the price of the intervening sections to avoid pecuniary loss. But it also served another purpose; it reduced the danger of land monopolies, as lands had in that form could best be disposed of in small quantities to settlers. It was natural for Congress to assume that lands in segregated tracts of 640 acres would not be attractive to speculators.

A few of the earlier grants directed the immediate withdrawal of lands which would "probably" fall within the terms of the grant. Until 1862 all grants were so framed. This practice led to a positive obstruction of settlement of the public domain, because from the date of the withdrawal until construction of the railroad the lands could not be acquired by settlers either from the Government or the

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railroad company. As soon as the injurious effect of the practice was discovered Congress promptly corrected it by inserting in all grants, commencing in 1862, provisions directing the withdrawal of the granted lands at the time of the filing of a map of general route and, in a few cases, of definite location and expressly providing that until this was done lands should be subject to pre-emption and homestead entry. The sole purpose of this, as interpreted by the Supreme Court of the United States, was to avoid any interruption of settlement upon the public lands. (*Railroad Company v. Baldwin*, 103 U. S. 426; *Winona, etc., v. Barney*, 113 U. S. 618, 625; *Leavenworth v. United States*, 92 U. S. 733, 748.)

(e) **Provisions for forfeiture.**

The first grants permitted the immediate sale of any or all of the lands granted, and provided that in case of failure to complete construction within the time prescribed the grantee (the state) should pay to the Government the purchase price received from the sale of the lands. Later, the grants provided for payment of the purchase price of the lands sold and forfeiture of the unsold lands. After 1852 the grants permitted sale of the lands only as the work of construction progressed, and provided that if default was made in the construction of the road within the time prescribed the unsold lands (afterwards the

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unpatented lands) should *revert* to the United States. This marked a complete reversal of the policy of what should happen in case of failure to comply with the conditions of the grant. First the value of the lands was considered a sufficient remedy. Afterwards the lands themselves were required. They were of more importance to the Government than their value, because the Government desired them for actual settlers.

(f) Provisions as to sales and use of the granted lands.

Prior to March 3, 1869, none of the grants in aid of internal improvements contained any provisions restricting the sale of the lands, either as to character of purchaser, quantity, or price, except that prior to 1850 most of the grants provided that the lands should not be sold for less than double the minimum Government price, the only abuse of the grants then anticipated by Congress being the squandering of the lands at insignificant prices. But beginning about January 1, 1869, the uniform policy of Congress with reference to grants in aid of internal improvements, was to annex conditions to the grants restricting the sale of the lands to *actual settlers*, in quantities not greater than one quarter section to a single purchaser, and for a price not exceeding \$2.50 per acre. The manner in which this reformation was brought about we will now discuss.

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Prior to the enactment of the Pacific Railroad bill in 1862 all grants in aid of internal improvements were made direct to the *states* and not to corporations. Congress naturally assumed that the states, in disposing of the lands, would have due regard for permanent industrial and commercial conditions. It was not necessary in the judgment of Congress to enjoin upon a state a duty to sell the lands in a manner that would conserve the interest of the state as well as the nation. The states, in most instances, disposed of the lands by turning them over to some corporation charged with the duty of constructing the railroad or other internal improvement. The states assumed that it was even more to the interest of the railroad companies than to the states that the lands be distributed among the producing classes in small quantities. In this the states were mistaken, as the events prove.

Prior to the Pacific Railroad bill of 1862 there had been little practical experience in the administration of railroad grants. Evils which subsequently arose out of them had not been anticipated. Therefore nothing was put in that bill restricting the manner in which the lands should be sold. Besides the grant was to a corporation, created by Congress, with provisions for Federal representation upon the board of directors. It was argued, and reasonably so, that there was no likelihood of a conflict be-

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tween the interest of the corporation and those of the public. It was also thought that the interest of the railroad company was identical with that of the states, namely, that it would desire to promote settlement along its line. That Congress was mistaken in this no one will doubt who is at all familiar with the history of the construction of the Union Pacific.

Another thing worthy of consideration, in this connection; in 1866 the policy of the Union Pacific Railroad Company, with respect to the disposition of its lands, had not developed; so that it cannot be said that the act of July 25, 1866, was passed in the light of the manner in which the Union Pacific was administering its grant. Another fact worthy of consideration is that the two grants involved in the case at bar are the only original grants direct to state corporations that ever became effective.

Between March 2, 1867, and March 3, 1869, there was no legislation upon the subject of railroad land grants. The subject underwent, however, a thorough discussion and consideration in Congress during that period. This resulted, as we shall presently show, in the enactment of the restrictions in the amendatory act of 1869, involved in this suit.

(g) **Evils of unrestricted grants.**

The conclusion of the war of the rebellion was immediately followed by a revival of industrial progress that was without a parallel in the previous

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history of the country. No where was the effect of this revival felt more than in the Far West. The unlimited natural resources of the western country held forth promise to the actual settlers which attracted thousands from the crowded cities of the East and from foreign shores. Beginning early in 1867, the movement westward, and particularly along the Union Pacific Railroad, literally overtaxed the capacity of all means of transportation. It was then within the power of those responsible for the conduct of the affairs of the Pacific railroads to justly fulfill every moral and legal obligation to the people of the United States. But this condition of affairs also afforded an opportunity for manipulating the affairs of that railroad in the interest of a few promoters and officers, to the detriment of the corporation itself and the general public. The subsidy of bonds and lands, intended to promote the success of the enterprise, and at the same time conserve the general interests of the nation, were perverted into a means of enriching a few financial adventurers. The granted lands were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad company. The prices obtained for the lands were small, thus the railroad company lost and the settler was compelled to make terms with the speculator. These developments resulted in vigorous protests addressed to Congress complain-

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ing of the manner in which these lands were being manipulated. The protests were not limited to any one section, nor to any one class. They came from all parts of the country, and from the substantial and representative elements of the nation. Public sentiment upon the subject was expressed through the public press, legislative memorials and petitions signed by thousands of individual citizens, all directing the attention of Congress to the demoralizing effect of the methods practiced by the railroad companies. As an example of the earnestness with which they were urged upon the attention of Congress, we invite attention to a petition from citizens of New York City, signed by many thousands.

*To the Senate and House of Representatives of
the United States:*

The undersigned citizens of the United States feeling the urgent necessity for the enactment of a law to prevent the further absorption of the public lands of the United States by railroads and other corporations and to have the residue of said public domain set apart for the *exclusive use of actual settlers* in limited quantities, do respectfully petition your honorable body to take prompt action for the passage of such a law.

We urge our appeal on the grounds that tens of thousands of the industrial classes of large

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cities and towns now unemployed must seek an outlet and escape from the poverty and distress which surround them or be rapidly driven to pauperism and crime.

We urge our appeal on the ground of simple justice to our children and to the immigrants now seeking our shores, fleeing from the very monopoly of lands so alarmingly threatening our Republic by the enormous absorption of the public domain by giant corporations and private monopolies.

We urge our appeal as a measure of justice to the whole American people as a rich legacy in trust by our generation for those to come after us—never to be alienated.

We urge our appeal finally as one deeply affecting the morals and well-being of our people, in that these giant corporations have become the allies of stock gamblers in turning our public domain, the heritage of all, into one vast national gambling arena.

To put a speedy end to these threatened evils and to confer a measure of equity and justice on the American people, we urgently pray the adoption of a law embodying the features herein set forth.

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(h) Congressional action in response to these protests.

The prevailing sentiment was that Congress had been deceived, and was confronted with the duty not only to correct the mistakes of the past so far as possible, but to avoid similar ones in the future.

The history of the subject leaves no possible room for doubt as to the specific intent and purpose of Congress, which was:

First. To subordinate the benefits of land grants to the general land policies of the United States.

Second. To the end that the restrictions imposed should be enforceable by the most efficient and practical remedies.

Third. That the best method was through a condition subsequent.

A careful study of the discussions upon the subject fails to disclose that Congress reposed any confidence in the railroad grantees, or was disposed in any wise to trust to the good faith of the railroad companies. Lack of faith in the grantees because of what they had done, was the dominating note in the discussions. No crumb of comfort can be found therein for persons who insist that conditions, such as the one appearing in the amendatory act of 1869, was intended to be "unenforceable, directive and regulative."

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(i) Congressional debates and proceedings upon the subject.

The chairman of the Public Lands Committee in the House, George W. Julian, on January 7, 1868, introduced a bill to prohibit the further disposition of the public lands, except under the provisions of the pre-emption and homestead laws, and the laws for disposing of townsites and mineral lands. (Cong. Globe, 2 Sess., 40th Cong., p. 371.)

In February, 1868, Mr. Lawrence, of Ohio, introduced in the House a bill "to secure to actual settlers the right to purchase lands heretofore granted to railroad and other companies." (Cong. Globe, 2 Sess., 40th Cong., p. 637.)

The changing sentiment of Congress upon this subject was exemplified by the enactment, on March 6, 1868 (15 Stat., 39). By this enactment it was provided that the Government lands, intervening the Pacific Railroad lands, should be disposed of to actual settlers only, in limited quantities, and for a limited price.

In January, 1869, the Denver Pacific bill came up for consideration in the House. This bill did not provide for a new grant, but revived an old grant, upon slightly modified terms as to location of railroad, beneficiary, etc. The Denver Pacific grant was one of the grants incidental to the Union Pacific grant, and therefore the terms of the Union Pacific grant, and the evils that had developed therefrom became the principal subject of the discussion. Mr.

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Washburn, of Illinois, made the principal speech upon the subject. He said:

When you contemplate the vast power of these non-resident landholders, the overshadowing land monopoly created, the evils and oppressions always connected therewith, we must all be filled with amazement at the reckless and shameless legislation of Congress on this subject. * * * I voted for some of the earlier bills. But when I saw the use that was being made of these grants, the brazen greed of the speculators who obtained possession of them to use for their own interests regardless of the public interests; * * * my views in regard to the whole policy of land grants were very materially modified. (Cong. Globe, 3d Sess., 40th Cong., p. 463.)

The same views were expressed by Mr. Julian, Mr. Holman, Mr. Logan, Mr. Donnelly, Mr. Lawrence and many others. (Cong. Globe, 3 Sess., 40th Cong., p. 463, *et seq.*)

An examination of the debates will demonstrate that the quotation which we have given from Mr. Washburn's speech expresses the general sentiment upon the subject.

On January 19, 1869, when the Denver-Pacific bill first came up for discussion, Mr. Lawrence, Mr. Julian and Mr. Logan each proposed an amendment.

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All the amendments, while differing in some particulars, proceeded on the theory that the unrestricted right in the railroad companies to dispose of the lands as they saw fit had been abused and that a change must be made which would insure the lands to actual settlers, in limited quantities, and for a price not exceeding \$2.50 per acre.

Mr. Julian's amendment read:

That the lands granted * * * shall be sold to actual settlers only, in quantities not greater than 160 acres to one purchaser and for a price not exceeding \$2.50 per acre.

This amendment, he said, expresses the true policy; "and the whole land grant system of our country will be repudiated, unless it shall be made to conform to the conditions I have stated." (Cong. Globe, 3d Sess., 40th Cong., p. 70, Appendix). The amendment was adopted.

Thus three different methods of controlling the disposition of railroad lands were proposed on one day. All were framed in the belief that the unrestricted right in the railroad companies to dispose of the land as they saw fit had been abused and that a change must be made, which would insure the land to the actual settlers in limited quantities, and for a price not exceeding \$2.50 per acre.

It was in this atmosphere that the actual settlers' provision was placed in the amendatory act of April

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10, 1869, consequently, he who says that the provision was not intended to be mandatory, but merely directive, has a heavy burden to sustain.

(j) **Proceedings in Congress, 1869 to 1871, application of the new policy.**

(1) From March 2, 1869, to March 3, 1871, every time a bill granting lands in aid of internal improvements, or reviving a former grant that had lapsed, came before the House, Mr. Julian or some other member of the Public Lands Committee moved an amendment in the form of a condition subsequent, such as was finally insetred in the act of April 10, 1869, involved in this suit. This amendment was offered a great many times during that period, and it was accepted without opposition, except on two or three occasions, hereinafter referred to, when Congress thought best not to annex the condition; and the acts of Congress upon these occasions emphasizes the intention to make the conditions enforceable whenever they were annexed to grants.

The number of times that this amendment was offered and accepted must not be judged by the number of laws that were finally passed. The amendment was offered and became a part of many bills that were defeated. There were more than ninety measures of this kind that failed to pass during this period, and as to most of these the amendment was offered and accepted. During this period

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there were only three grants enacted; the West Side grant involved in the case at bar, the Texas Pacific grant subsequently forfeited, and the grant of March 3, 1869, to the State of Oregon to aid in the construction of a wagon-road from Roseburg to Coos Bay. (The act of April 10, 1869, is not a grant.)

The first bill granting lands to come before the House after the adoption of this new policy was the Coos Bay Wagon Road grant, just mentioned (15 Stat., 349). The history of this enactment discloses the fact that in some way the terms of the bill were juggled so as to omit the restriction as to actual settlers, although actually intended by Congress, or at least intended by the House.

The bill was known as Senate bill No. 167. It passed the Senate, and came before the House on March 2, 1869, the next to the last day of the Fortieth Congress. Immediately after the bill came up for consideration Mr. Julian offered his usual amendment. It reads:

Provided, That the grant of lands hereby made shall be *upon the condition* that the lands shall be sold *to actual settlers only*, in quantities not greater than one quarter section, and for a price not exceeding \$2.50 per acre.

Mr. Julian stated that the bill had not been considered in committee, but if the proposed amend-

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ment were accepted he would not insist upon a reference of the bill to the Public Lands Committee.

Mr. Mallory, Representative from Oregon, and who had charge of the bill, made a statement in favor of the bill. A motion to refer the bill to the Public Lands Committee was made and defeated. The bill came before the House on the question of Mr. Julian's amendment. Mr. Julian modified the amendment by adding the words "to each person" after the words "quarter section," making the clause read "in quantities not greater than one quarter section to each person." *The amendment was then agreed to without objection, and in that form the bill was passed, and the clerk of the House was ordered to report the action of the House to the Senate and request the concurrence of the Senate in the amendment.*

Being the next to the last day of the session, the matter was immediately communicated to the Senate without the usual precautions. It came up before the Senate within a short time on the same day. But in some manner the terms of the House amendment were changed in the meantime, and it was reported to, and read in, the Senate as follows:

"Provided further, That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in

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quantities not greater than one quarter section and at a price not exceeding \$2.50 per acre.

The restriction as to actual settlers had been eliminated from the amendment. The change was not discovered, and in the latter form the amendment was concurred in by the Senate, and in that form the bill was enrolled, signed by the President of the Senate and Speaker of the House, and approved by the President of the United States the next day, March 3, 1869.

Whether this change occurred through inadvertence or through improper influences can only be conjectured. The haste with which legislative matters are handled on the last two days of a session made either possible. But there is no doubt of the accuracy of the foregoing facts.

(Congressional Globe, third session Fortieth Congress, p. 1798-1820.)

The proceedings show that the amendment proposed by Mr. Julian was not offered because of any special policy peculiar to that grant, but in fulfillment of the general policy as to all grants hereinbefore mentioned. This is borne out by the proceedings concerning another grant on the same day, and within a few minutes after the proceedings relating to the Coos Bay grant, when it was expressly stated that these amendments were offered pursuant to a general policy adopted by both Houses of Congress.

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Upon the same day, March 2, 1869, Senate bill No. 679 came before the House for consideration. The object of this bill was to extend the time for the construction of a wagon road under the act of July 2, 1864 (13 Stat., 355).

Pursuant to the policy that had been adopted, the moment this bill came before the House for consideration, Mr. Julian moved the following amendment:

Provided, That the grant of lands hereby renewed and continued shall be *upon the condition* that the lands shall be sold to actual settlers only, in quantities not greater than a quarter section and for prices not exceeding \$2.50 per acre.

In support of his amendment, Mr. Julian said:

Mr. Speaker, the amendment which has been read by the clerk is a *provision which ought to be applied to every future grant of land and to every dead grant that seeks a revival at our hands.* * * * The adoption of the amendment will not defeat the passage of the bill, for *the Senate like the House, has repeatedly approved of the very condition prescribed in the amendment.* (Cong. Globe, 3d Sess. 40th Cong., p. 1821.)

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Again we find *the intention to create a condition subsequent expressly declared*, and apparently understood and concurred in by all.

Congressman Mallory, of Oregon, was also in charge of this bill. He stated that he did not object to the principle of the amendment; but that the work of construction had been delayed not through the fault of the company, but through the interference of hostile Indians; and that an amendment at that late stage of the session would undoubtedly defeat the bill, because the Senate would not have time to concur. (The next day was the last of the session.)

Upon Mr. Mallory's statement as to the cause of the delay, the House permitted the bill to be put upon its final passage under the previous question, which did not permit any amendment.

Here we find an instance when, for legitimate reason, Congress omitted to impose the conditions. Under the contention of the defendants in the case at bar, Congress did not intend them to be enforceable in any case. Why then did Congress in some instances annex the conditions; in other instances modify them; and in still other instances decline to annex them? Is not the discrimination with which Congress annexed these conditions proof conclusive that it understood and intended them to be enforce-

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able, and hence the caution with which it imposed them?

A special session of the Forty-first Congress was convened shortly after March 4, 1869. During this session, three acts were passed, reviving lapsed railroad grants. They were all approved on April 10, 1869, and are as follows:

Act of April 10, 1869 (16 Stat., 47), extending the time for the Oregon Company to file assent to grant of July 25, 1866 (being the act involved in the case at bar).

Act of April 10, 1869 (16 Stat., 45), reviving grant to the State of Alabama in aid of the construction of railroads (being the act construed to be a condition subsequent by the Alabama Supreme Court in *Warrior River Coal & Land Co. v. Alabama State Land Co.* (154 Ala. 135, *infra*).

Act of April 10, 1869 (16 Stat., 46), extending time for the construction of railroad under grant to the States of Missouri and Arkansas.

By the time these bills came before Congress for consideration, the policy of annexing conditions restraining the sale of the granted lands had become so generally accepted that there was little discussion and no opposition. In each instance Mr. Julian moved his amendment in the form of a condition

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subsequent, and the amendments were agreed to as a matter of course.

The subsequent action of Congress with reference to the third act of April 10, 1869, above mentioned, is instructive. By the act of April 10, 1869 (16 Stat., 46), the time for the construction of the railroad under the grant to the States of Missouri and Arkansas (by act of Feb. 9, 1853) was extended. When the bill came before the House, Mr. Julian moved his usual amendment, assuming that the grant was in lapsed condition; and the amendment was adopted and the bill passed in that form. Subsequently it was learned that this assumption was incorrect; that there existed no default at the time of the passage of the act of April 10, 1869.

Thereupon, by act of March 8, 1870 (16 Stat., 76), Congress corrected the error that had been made by repealing the conditions imposed by the act of April 10, 1869. At the time the correction was made Mr. Julian expressly stated that the policy which had been adopted by both branches of Congress, to impose conditions of that character, when Congress had the right to do so, would not be departed from; but that through inadvertence the conditions had been imposed in a case where Congress had no right to do so, and he was therefore willing that the mistake be corrected. (Congressional Globe, second session Forty-first Congress, p. 1698.)

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The attitude of Congress toward railroad land grants on April 10, 1869, when the law involved in the case at bar was enacted, is aptly illustrated by the fact that on that day a joint resolution was adopted as follows:

That the Attorney-General of the United States be, and he is hereby, authorized and directed to investigate whether or not the charter and all the franchises of the Union Pacific Railroad Company and of the Central Pacific Railroad Company have not been forfeited, and to institute all necessary and proper legal proceedings. (16 Stat., 56.)

It is seriously urged by counsel for the defendants that Congress, by the enactment of April 10, 1869, involved in this suit, had the same general intent, and the same general sentiment upon the subject of railroad grants, that it had at the time of the enactment of the act of July 1, 1862. And yet, on the same day, Congress adopted a resolution which had for its purpose the forfeiture of every franchise created by the act of July 1, 1862.

That Congress should set no more traps for the American people of the pattern of July 1, 1862, was the predominating sentiment on April 10, 1869.

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(k) Discussions relating to act of May 4, 1870, West Side grant.

Early in 1870, Senator Williams of Oregon introduced in the Senate a bill making a separate grant to the West Side Company, for the purpose of ending the controversy in Oregon between the East Side and West Side companies over the grant under the act of July 25, 1866. So firmly intrenched had become the policy of refusing to make any new grants, or reviving any lapsed grants, except upon conditions restricting sales of the granted lands to actual settlers, in limited quantities and for a limited price, that a provision containing those restrictions was inserted in the bill introduced by Senator Williams. This bill was afterwards passed and became the act of May 4, 1870 (16 Stat., 94).

Counsel for defendants have referred to the debate in the Senate upon the subject of the act of May 4, 1870, in support of their contention as to the meaning and effect of the provision restricting sales to actual settlers. The Congressional Globe discloses the following:

The bill came up for discussion in the Senate on February 2, 1870. Senator Thurman vigorously objected to the bill, stating that the general assembly of Ohio had protested against any further land grants, and that the basis of this protest was the opposition to the unrestricted grant of July 1, 1862, known as the "Pacific Railroads bill." Senator Stewart then called Senator Thurman's attention to

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the provision restricting sales to actual settlers. Senator Thurman expressed a doubt that this provision would ever be obeyed or could ever be enforced by any practical method. Senator Stewart, Senator Cassary, and Senator Williams expressed the opinion that by virtue of the actual settler provision, settlers could go on the lands the same as under the public land laws. During this debate Senator Vickers said:

As I understand the bill *the company has no right to sell the lands to anybody but an actual settler. If the lands are sold to actual settlers there is no forfeiture. If a portion of the land is sold to actual settlers the portion unsold will be forfeited to the Government, if that condition is violated.*

(Observe that Senator Vickers understood that the right of forfeiture for breach of the condition would not affect lands that had been sold within the restrictions imposed, but simply to the unsold lands.)

Again, Senator Vickers said:

The grant is made *expressly upon condition that the lands are to be sold to actual settlers.*

It is not contended that the court should necessarily adopt the opinion of Senator Vickers. But it is at least interesting to observe that his interpre-

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tation of the meaning of the provision and the remedies available to the Government in case of a breach is strictly in accordance with the law upon the subject.

Upon the assurance that this provision would be effective, the Senate passed the bill.

(See Congressional Globe, second session, Forty-first Congress, pages 965, 1426-1430.)

When this bill came up for consideration in the House the same general debate took place. Reference was made to the fact that ten days previously a resolution was unanimously adopted declaring that land grants should cease; also to the fact that over ninety bills making grants of that kind had been introduced during the session and were then pending. Two Members of the House expressed the opinion that under the provisions of the bill the railroad company could be compelled to sell to actual settlers. Mr. Lawrence, of the Public Lands Committee, several times inquired if the bill contained a provision restricting sales of the granted lands to actual settlers, pursuant to the policy which had been adopted, and was assured that it did. Just before the bill was put upon its final passage, a member of the Public Lands Committee asked leave to add the amendment usually proposed by Mr. Julian. Those in charge of the bill stated that the provisions of sec-

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tion 4 were in substance the same as the proposed amendment. Upon this assurance, the bill was passed in that form.

(See Congressional Globe, second session Forty-first Congress, pages 2361, 3107-3110.)

(1) **Resolution of Congress of May 31, 1870.**

After the adoption of the policy to make no new grants, or to revive old grants that had lapsed, except upon condition that the granted lands should be sold to actual settlers only, there was but one real departure from that policy. That was by the resolution of May 31, 1870 (16 Stat., 378), relating to the Northern Pacific grant. This resolution, among other things, authorized the Northern Pacific Company to construct a line connecting Portland with Tacoma, and extended a grant of land in aid of the construction thereof, upon the same terms as the original grant. Pursuant to the policy hereinbefore spoken of, an amendment was offered, in the form of a condition subsequent, restricting the sale of the granted lands to actual settlers, in quantities not exceeding 160 acres, and for a price not exceeding \$2.50 per acre. This precipitated one of the most protracted debates in Congress down to that time.

The fight was a bitter one, finally resulting in the substitution of an amendment providing that the lands not sold or otherwise disposed of at the expiration of five years after the completion of the

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railroad, should be subject to preemption; being identical in terms with the provision of the Union Pacific grant construed in the case of *Platt v. Union Pacific* (99 U. S., 48). It is unnecessary to comment upon the methods by which this result was brought about. It is sufficient to say that no legislation of Congress ever created a greater scandal. Charges of corruption were freely indulged during the debate. Mr. Julian, and a few of the other members of Congress, who had been foremost in the fight for the extension of the principles of the actual settler policy to railroad grants, were absent. The bill passed both Houses by a very narrow margin.

The action of Congress upon this occasion in no way detracts from its general intent with reference to the annexing of conditions restraining the method of selling granted lands. On the contrary, the character of the debate, and the action of Congress show that the sentiment of Congress was divided into two general classes; some contending for the imposing of effective restrictions upon the manner of selling the granted lands, the others being opposed to it. Those who favored the imposing of effective restrictions, proposed to do so by an amendment exactly the same as the provision of the act of April 10, 1869. Those opposed to it proposed as a substitute a provision identical with that involved in the *Platt Case*. It was understood by everyone that the one provision had a meaning and effect directly

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the reverse of the other; and each was supported by its friends upon that ground. If the contention of the defendants in the case at bar is correct, and these provisions are identical in general purpose, then every Member of Congress was mistaken and a long and bitter fight was carried on with nothing at issue.

In the face of this controversy in Congress (which was virtually contemporaneous with both the act of April 10, 1869, and the act of May 4, 1870) it is the height of absurdity to contend that by the provision of the act of April 10, 1869, Congress meant the same as by the provision in the Union Pacific grant, or the similar provision in the resolution of May 31, 1870.

The passage of the resolution of May 31, 1870, relating to the Northern Pacific grant, with no restrictions upon the sale of the granted lands, was the death knell of the system of granting lands in aid of internal improvements. It was but a momentary lapse of the new policy; it involved but a small quantity of lands; and the practical effect of it was to hasten the abolishing of grants in aid of internal improvements, upon any terms or conditions.

The sentiment against land grants developed so rapidly, that President Grant, in his second annual message, on December 5, 1870, recommended that no further grants be made in aid of internal improve-

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ments; but that if Congress disagreed with him, in all future grants the rights of settlers and the interests of the Government should be better protected, by appropriate legislation.

The recommendation of the President reflected the prevailing sentiment of Congress. The system of land grants was abolished. There was but one exception, the Texas-Pacific grant of March 3, 1871, the circumstances of which will now be explained.

(m) **Texas-Pacific grant of March 3, 1871.**

From 1862 to 1866 Congress had made three large grants establishing transcontinental lines for the benefit of the Northern States—the Union Pacific, the Northern Pacific, and the Atlantic and Pacific—with several branch lines. The Southern States received virtually no benefits from these grants. *This led to the passage of the Texas-Pacific bill.* (16 Stat., 573.)

Shortly after peace was established, the conservative members of Congress advocated the adoption of reasonable concessions to the South, to heal the wounds caused by the unfortunate conflict. Among the proposed measures of this kind was a grant of public lands to aid in the construction of a transcontinental railroad for the benefit of the Southern States, extending from New Orleans to the Pacific coast.

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When the bill came up for consideration, Mr. Julian moved his usual amendment, pursuant to the policy then prevailing. But in answer to the proposed amendment, it was stated that by way of conciliation of the South, it was desired to make the Texas-Pacific bill identical in terms with the Union Pacific grant. At the same time the general policy of making no further grants was emphasized. There is no mistaking the purpose of Congress. It was expressly declared that the hope of promoting friendly relations between the North and the South, justified a temporary departure from the prevailing policies of Congress.

The action of Congress on the same day, March 3, 1871, with reference to a bill reviving another of the grants to the State of Alabama, emphasizes the policy of Congress. Mr. Julian again offered his amendment. There being no reason to depart from the established policy in this instance, the amendment was accepted without opposition and as a matter of course. (See act of Mar. 3, 1871, 16 Stat., 580.) *This discrimination on the part of Congress can be explained only on the theory that Congress understood and intended that these restrictions when imposed should be binding and enforceable, and to that extent subordinate the benefits of the grants to the general public land policies of the United States.*

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(n) Policy of Congress since March 3, 1871.

After March 3, 1871, there was no change of policy. The sentiment against land grants gradually increased until it became an established national principle. This opposition to land grants was soon expressed in a number of acts to forfeit the grants in cases where the grantees were in default; and in the enactment of the general forfeiture act of September 29, 1890. (26 Stat., 496. For list of acts see Appendix B.)

All these acts were sustained by the Supreme Court. (*United States v. O. & C. R. R. Co.*, 164 U. S. 526; *Atlantic & Pacific v. Mingus*, 165 U. S. 413; *United States v. Tennessee & Coosa R. R.*, 176 U. S. 242.)

For the past twenty-five years the policy of the Government has been to hold the railroad companies strictly within the limitations of their grants, and prevent the invasion of any rights reserved on behalf of the public. It was pursuant to this general policy, and as a logical sequence of the previous history of the subject, that when Congress became advised of the willful and flagrant violation of the restrictions imposed by the acts of April 10, 1869, and May 4, 1870, involved in the case at bar, by resolution of April 30, 1908, it directed and authorized the institution of this suit to enforce the rights of the people of the United States, including the right of

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forfeiture for breach of these conditions.

It is respectfully submitted that an intelligent and impartial consideration of the history of the subject leads to the following conclusion:

By the act of April 10, 1869, and the act of May 4, 1870, Congress intended to annex to the grants involved in the case at bar conditions subsequent restraining the alienation of the granted lands by the railroad company within the three limitations prescribed.

Did Congress use apt words to express its intention? This brings us back to the question, "Does the actual settlers provision constitute a covenant, a trust, an offer which anyone may accept, or a condition subsequent?"

Third. NOT A COVENANT.

Transactions relating to the disposition of the public domain do not resemble those of a private owner engaged in selling lands with the sole motive of realizing their pecuniary value.

In *United States v. Trinidad Coal Company*, 137 U. S. 160, 170, the court observed that in disposing of public lands the Government does not occupy the "attitude of a mere seller of real estate for its market value."

The mere construction of the railroad was not the ultimate object, but the means of accomplishing

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the object which Congress had in mind. The railroad was looked upon as a means to promote settlement. (*Platt v. Union Pacific Railroad Co.*, 99 U. S. 48.) Congress never intended that the grant to it would obstruct or prevent settlement.

The amendatory act of April 10, 1869, was designed to correct some defect in the original act and must be construed in that light.

From the nature of the enactment and its manifest purpose it necessarily follows that Congress intended that it should be enforceable by some practicable and thorough method. To say that it did not change the legal effect of the act of 1866, would be to say that Congress in making the amendment had done a useless thing. No rule of construction will permit this if it can possibly be avoided.

It must be presumed too that Congress intended to adopt the method best calculated to carry out its purpose.

In *Gibson v. Chouteau*, 13 Wall. 92, the court, speaking of the public domain, said:

Congress has the absolute right to prescribe the terms, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfers shall be made.

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Would it serve the congressional purpose to construe the actual settlers provisions as a covenant? For breach of a covenant the action is for pecuniary damages. In Tiffany on Real Property, Vol. 1, p. 160, it is said:

A condition is to be distinguished from a covenant, a breach of which merely renders the covenantor liable in damages.

Suppose the government had brought a suit to recover damages for a breach of the alleged covenant; what would have been the measure of its recovery? The government, as such, would gain not a penny by the observance of the provisions; consequently could not be damaged by its non-observance.

Ordinarily covenants affect only the parties and do not affect the land. Conveyances in violation of a covenant are valid. Covenants in restraint of the power of alienation are absolutely worthless.

In Warvelle on Vendors, 2 ed. Vol. 1, sec. 451, it is stated "that a restraint upon the power of alienation is nugatory unless made enforceable by provision for reverter."

In Hale v. Finch, 104 U. S. 261, the distinction between a covenant and a condition is discussed and the rule laid down that where the instrument, whether a bill of sale, deed or grant, precludes the idea of personal responsibility, it is not a covenant. There

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is nothing in the clause under consideration which implies such responsibility.

The actual settlers provision was not incorporated for the purpose of securing to the United States pecuniary damage, but for the purpose of realizing the fruits of a national policy; therefore, it is not a covenant.

Fourth. NOT A TRUST AS CONTENDED BY CROSS-COMPLAINTS.

Cross-complainants contend that the settlers clause creates a trust in favor of actual settlers and that they are entitled to avail themselves of it.

(a) **The actual settlers clause contemplates a sale.**

There is nothing in the actual settlers provision indicating that Congress had confidence in the railroad company. The reverse is true. Experience had demonstrated that railroad companies, in matters of this kind, should be restrained, not trusted. If this be a trust Congress deliberately committed to a party, having a known adverse interest, the discharge of an important governmental function with reference to several million acres of land. If the trustee proved recreant it could lose nothing; but it might gain much. The government would have no remedy. The fact that Congress imposed restraints argues that it believed them necessary. This rebuts the idea of confidence.

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Clearly the railroad company was empowered to sell the land. A sale is a contract and implies discretion upon the part of the vendor and vendee. The vendor in this case had all the rights of any vendor, except that (1) it must not sell more than 160 acres to any one person; (2) the sale must be to an actual settler; and, (3) for a price not to exceed \$2.50 per acre. Within these limitations the railroad company had the same discretion as any other vendor would have in making a sale. It might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres; or in any amount not exceeding 160 acres.

Besides, instruments creating trusts do not use the language of bargain and sale. Every word in the provision repels the idea of a trust.

(b) **Restrictions imposed do not rest upon confidence.**

A trust implies a confidence by the creator thereof in the trustee. In 28 A. & E. Enc. of Law, 858, it is said a trust may be defined as

An obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed.

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We do not understand that cross-complaints claim as beneficiaries of a charitable trust. The actual settlers provision contains nothing that could bring it within the recognized definitions of such a trust. If, therefore, there be a trust it must be a private one and subject to all the tests applicable to such a trust.

(c) **Necessary elements of an enforceable trust.**

In Second Pomeroy's Equity Jurisprudence, Section 1009, we find this language:

The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject matter or property embraced within the trust, the *beneficiaries* or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general or equivocal, that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail. (Italics ours).

There is a distinction between charitable trusts and those that are not. This distinction must be kept in mind.

In most jurisdictions the uncertainty of the beneficiaries is a characteristic of a charitable trust.

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In Beach on Trusts and Trustees, Sec. 322, it is said:

In a charitable trust, the beneficiaries need not be definitely named, and even where there is no adequate designation of a *cestui que trust* the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt. (Russell v. Allen, 107 U. S. 163; Perry on Trusts, secs. 66 and 95.)

Where the trust is *not* a charitable one, and in some jurisdictions where it is, the beneficiaries must be definitely pointed out.

In Levy v. Levy, 33 N. Y. 97, 107, the court said:

If there be a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void, whether good or bad, wise or unwise.

In Weaver v. Spurr, 56 West Va., 95, 105, it is said:

There cannot be a trust without a *cestui que trust*; and if it cannot be ascertained who the *cestui que trust* is, it is the same thing as if there was none.

In Brown v. Caldwell, 23 West Va. 187, we read:

It is difficult to conceive of anything more vague, indefinite, and general in its character.

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The societies here designated are neither local nor fixed. They, in fact, embrace the whole Christian world, and are not only indefinite but unascertainable.

This was a charitable trust, but subject to the same rules as those which apply to private trusts.

In *Heiss, Executor, etc., v. Murphey et al.*, 40 Wis. 276, 292, the beneficiaries were Roman Catholic orphans. The bishop was named as trustee and authorized to sell the property and “use the proceeds for the benefit of the Roman Catholic orphans.” The court held that the trust was too indefinite as to the beneficiaries for enforcement and observed:

There are no ascertainable beneficiaries, either as a class or individuals, and therefore the trust cannot be effectually carried out.

In *Wheeler v. Smith*, 9 How. 55, the trust provision was declared invalid, because, to use the language of the court:

A trust is vested in the executors, but the beneficiaries of the trust are uncertain and the mode of applying the bounty is indefinite. (*Perrin et al. v. Carey et al.*, 65 U. S. 465; *Jones v. Habersham*, 107 U. S. 174; *Vidal v. Girard’s Executors*, 2 How. 127.)

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The effect of all these decisions is that, while in some jurisdictions the same definiteness as to beneficiaries is required in charitable trusts as in private trusts, in all jurisdictions private trusts must be so definite as to the beneficiaries that the terms used therein to describe them will enable any one to select them without doubt.

(d) **Beneficiaries Indefinite.**

Could there be anything more indefinite than the description of the alleged beneficiaries in the actual settlers provisions. If it be said that "actual settlers" constitute a class, and that the description thereof is definite, we answer that the grant is not to a class as a whole, to be enjoyed by the members thereof as tenants in common. It contemplates a division of the land amongst many people. Moreover to be actual settlers they must belong to one of two classes (a) those who have actually settled upon the lands, or (b) those who have not but are actual settlers elsewhere. If to the latter class it is a very numerous one, for actual settlers may be found in the city, the state or nation. Most of the population of the United States consists of actual settlers. So large is this class that there would not be an acre apiece in all the grants for a third of the number composing it. A selection would, therefore, have to be made of those who might be accommodated. That selection has not been made. Until it has been

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the actual settlers—the alleged beneficiaries—cannot be known. They are, therefore, indefinite—nothing could be more so—and, consequently, the trust, if one was intended, is void for uncertainty with respect to the beneficiaries.

If they belong to the first class they are trespassers, because they could not become actual settlers, lawfully, without the consent of the owner, and that has not been given. Indeed to say that it was within the intention of Congress that persons might acquire a right to the lands by becoming trespassers thereon, would be to say that Congress had given them a right conditioned on their doing wrong, which would be absurd.

(c) **Another objection to cross-complainants theory.**

Trusts are either executory or executed. In *Beach on Trusts and Trustees*, section 59, the distinction is pointed out. He says:

Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you and convert them into the legal estate? (*Nicoll v. Ogden et al.*, 29 Ill. 323, 385; *Neves v. Scott*, 9 How. 196, 211.)

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If this be a trust, is it executed or executory? It is the former if there be nothing left to the discretion of the railroad company; if the company must sell a certain quantity at a certain price, and upon certain terms to the *cestui que trust*. But this is not required. The only limitations placed upon the company are maximum limitations; within those it may exercise its own volition. It may sell in quantities of forty, sixty or one hundred acres, at fifty cents, a dollar, or two dollars and fifty cents an acre; for cash, or upon such terms, and with such security, as it may choose. The trust then, if one at all, is an executory trust. Until the choice of the trustee has been made in the matters left to its choice, the cross-complainants could acquire no rights in any of the property. So that even if we say the beneficiaries are definite, they could have no enforceable rights until the trustee had fixed the terms upon which they might secure them.

(f) **Decisions against cross-complainants.**

In *Nichols v. Southern Oregon*, 135 Fed. 232, a provision in the grant of March 3, 1869, quite similar in its terms to the settlers clause in the case at bar, was construed by the court. The provision reads:

Provided further, That the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only

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in quantities not greater than one quarter section, and at a price not exceeding \$2.50 per acre.

The plaintiff in that case selected 160 acres, tendered to the defendant \$2.50 per acre therefor and demanded a conveyance. The defendant refused. Plaintiff brought suit upon the theory that he had a right to a conveyance. The court denied his claim for the following reasons:

The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the State, subject to restrictions as to the price at which they would be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the State was required to observe in selling the granted lands, at such time after they were earned as the State should conclude to sell them. The object to be accomplished in no-wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the State has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken

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advantage of by the United States. Furthermore, above 30 years ago Congress authorized patents to issue to the State or to any corporation or corporations to which it had transferred its interest, and patents have been issued to the State's grantees in pursuance of that law. It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant.

In *Warrior River Coal & Land Company v. Alabama State Land Company*, 154 Ala. 135, the Supreme Court of Alabama was called upon to construe the provisions of the act of April 10, 1869, renewing the railroad grant to the State of Alabama under the act of June 3, 1856. This act contained a provision identical with the settlers clause in our grant. Speaking of it the court said:

The limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only.

According to the view of this court the right to take advantage of the violation of the grant was in the Government and in nobody else. *Ergo* not in actual settlers.

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Cross-complainants cited the following decisions, in the court below, in support of their contention: Rice v. Railroad Company, 1 Black 358; Mills County v. Railroad Company, 107 U. S. 557; United States v. DesMoines, etc., Co., 142 U. S. 527; Ashuelot Nat. Bank v. City of Keene, 9 L. R. A. (N. S.) 758. They can all be distinguished.

The Rice case was with reference to a grant to the Territory of Minnesota for certain purposes. There was no beneficiary.

The Mills case was a case in which certain lands were granted to the State of Iowa for stated purposes. It was claimed that the State had not observed the requirements of the act. The court decided that the question was one between the United States and the State; that the obligation imposed did not constitute a trust which private parties could enforce.

The Des Moines, etc., case construed a grant to the Territory of Iowa to aid in the improvement of the Des Moines River. The court decided that no *cestui que trust* was created and that the grant was to the Territory to be used for a specific purpose.

The Ashuelot Nat. Bank case disposed of a controversy with respect to the provision of a deed. The heirs of the grantor sought to have the provision declared a condition subsequent. The court

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refused to do this, but held that the deed created a trust in favor of the city for a certain purpose. The trust was in the nature of a charitable one.

None of the foregoing authorities give any countenance to the contention of the cross-complainants.

If cross-complainants assert that the trust is a charitable one they must also fail, because the idea of such a trust is utterly inconsistent with the idea of an exclusive interest in any of the beneficiaries. In a charitable trust the persons to be benefitted must be vague, uncertain and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being (Perry on Trusts and Trustees, 6 ed. sec. 710). They cannot select themselves. As possible beneficiaries of a charitable trust they would have absolutely no standing in court to enforce the trust (*Boenbardt v. Loch*, 113 N. Y. S., 747; *Burbank v. Burbank*, 152 Mass., 254).

Fifth. NOT AN OFFER WHICH ANYONE MAY ACCEPT, AS INTERVENORS CLAIM.

(a) Have the intervenors acquired vested rights against the Government.

The intervenors claim that the grant makes a standing offer to any one who may qualify himself to accept it. They say that they have qualified themselves by declaring their intention to become

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actual settlers and tendering the price fixed in the grant. This, they assert, amounts to an acceptance of the offer, and gives them a vested right which they can enforce against both the railroad company and the Government. They say that their position is analagous to that of preemptors and homesteaders. And this leads to the inquiry, when does the preemptor or homesteader acquire a vested right against the Government? Not until he has performed all that is required of him by the law to entitle him to a patent; up to that time he has no vested right.

In *Frishie v. Whitney*, 9 Wall. 187, the court quoted with approval, the following:

A mere entry upon land, with continued occupancy and improvements thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the Government. (10 Opinions of the Attorney-General, 57.)

In *Yosemite Valley case*, 15 Wall. 77, we find this:

When these prerequisites (including the payment of the purchase price) have been complied

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with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived.

* * * The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

(*Shepley v. Cowan*, 91 U. S. 330; *Atherton v. Fowler*, 96 U. S. 513; *Wirth v. Branson*, 98 U. S. 118.)

Under these authorities intervenors have no interest which they can enforce against the Government.

(b) **Have they acquired vested rights against the railroad company.**

The authorities make it clear when the rights of preemption and homestead attach.

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In *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 357, the court said:

Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make and affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered.

In *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 386, the court says:

But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office.

The court, quoting from *Lansdale v. Daniels*, 100 U. S. 113, 116, adds:

Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.

In *Tarpey v. Madsen*, 178 U. S. 215, 225, it was said:

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And the acceptance of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the preemption claim.

(*Eastern Oregon Land Co. v. Brosnan*, 147 Fed. 807; *Maddox v. Burnham*, 156 U. S. 544.)

These decisions hold that homesteaders and preemptors acquire no rights until an entry has been made by the one and a proper notation in the land office of a preemption by the other.

The intervenors have done nothing which is the equivalent of those requirements.

It is a rule that where there is a contest between rival claimants the one first in occupancy of the land with intention of appropriating it is given priority, but this rule does not aid the intervenors.

In *Atherton v. Fowler*, *supra*, the court, after saying that the law intended to give the settler time to build a house, break up the ground, and make settlement first and payment afterwards, continued:

During this preliminary period he had no vested right to the land; but, as we have elsewhere decided, he did thus acquire the right of preference in the purchase—that is to say, if he made the necessary settlement and improvement, and the necessary declaration in writing,

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no other person could buy the land until the period elapsed which the law gave him to pay the purchase money.

In *Tarpey v. Madsen*, *supra*, this was said:

So that any controversy between two occupants of a tract open to preemption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy.

So far then, as his rival is concerned, the claimant first in possession has what is equivalent to a vested right, but he has no such right as against the Government.

(c) **Decision relied on by intervenors.**

In *Jumbo Cattle Co. v. Bacon*, 17 S. W. 136, a grant made by the State of Texas was construed. It provided for the sale of the land at fifty cents per acre to any responsible person who would make application therefor and survey it. The plaintiff showed that he had done all these things, except paying the price, which he tendered. There was a definite offer there, on definite terms. Plaintiff accepted the offer and complied with the terms so far as he could. The court said:

When there is an offer made by the act of the legislature, which is accepted by an individual, there is a contract which it is not within

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the power of the State to impair. * * * The expenses of the surveys, in connection with the price to be paid to perfect the title, are sufficient consideration to support the contract.

A casual inspection of the two acts will show there is no similarity between their respective terms. In the Texas grant there was a specific offer to sell such quantity as the applicant might select at fifty cents per acre. The plaintiff accepted the offer in the precise terms in which it was made, and thereby a contract came into existence between him and the State of Texas.

Now, look again at the terms of the actual settlers provisions. If it be treated as an offer to sell, how much land was offered to each settler? What was the price? How was it to be paid for, in cash or on time? The grantee might have one view about these matters, the settlers another. Until they agreed there was no meeting of the minds and, hence, no contract.

Another matter in this connection: Congress has provided an orderly method for the distribution of the public lands; it has provided with exactness the terms upon which they may be acquired by those desiring them. When the Government withdrew the lands covered by this grant it authorized the railroad company to dispose of them as it might think proper within certain limits. If the views pressed

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upon the court by the intervenors prevail Congress abandoned its orderly policy of years, and substituted therefor one of irregularity and uncertainty.

(d) Not a contract for benefit of third parties.

Are the intervenors entitled to invoke the principle that where a contract is made with one party for the benefit of a third, the latter may avail himself of it and enforce it by suit if necessary? No, because in such cases the persons for whose benefit the contract is made are defined. Here there is no such definition. Who can say that he has a right to any particular part of the land? Concededly, he has no right to more than 160 acres, but by what rule of construction can it be said that he has a right to that number of acres, rather than fifty or forty. We have fully discussed the uncertainty of the alleged beneficiaries (*Ante*. p. 189).

Neither the cross-complainants nor the intervenors have any rights in the premises.

THE ACTUAL SETTLERS PROVISION OF THE AMENDATORY ACT OF 1869 CONSTITUTES A CONDITION SUBSEQUENT.

First. General characteristics of conditional estates.

Where an estate is granted and its continuance made to depend upon the doing of something by the grantee, it is an estate upon condition subsequent. No particular form of words is necessary to create

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such an estate; if the intention appears from the language used it will be enforced. But there are certain words which, if used, necessarily evidence the existence of such an estate. They may be divided into two classes (a) where the grant is followed by the words “provided that, so as, or under this condition”; in such cases words of re-entry are not necessary; and (b) where the grant is followed by words “*si contingat*” and the like, but these latter words must be followed by words authorizing the grantor to re-enter.

In Sheppards Touchstone (p. 121) we read:

Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which *in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition*, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. And therefore if A grants lands to B to have and to hold to him and his heirs, *provided that*, or so

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as, or under this condition, that B do pay to A ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words. But there are other words, as *si*; *si contingat*, and the like, that will make an estate conditional also, but then they must have other words joined with them, and added to them in the close of the condition, as that then the grantor shall re-enter, or that then the estate shall be void, or the like.

The same authority states the rule in another way (p. 122):

Where the word “provided” is inserted amongst the covenants of the deed, it doth make the estate conditional when there are these things in the case:

1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself.

2. When it is compulsory to the feoffee, donee, etc.

3. When it comes on the part, and by the words of the feoffor, donor, lessor, etc.

4. When it is applied to the estate, and not to some other matter.

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The second and third qualifications are clear and need no word of explanation. Touching the first it is said:

But if the clause have dependence on another clause of the deed, or be the words of the feoffee, etc., to compel the feoffor to do something, then it is not a condition but a covenant only; as if there be in the deed a covenant that the lessee shall scour the ditches, and then these words follow “provided that the lessor shall carry away the earth.”

As to the fourth qualification it is said:

So if this clause be applied to some other thing, and not to the thing granted, then it is no condition, as if a lease of land be made rendering rent at B. Provided that if such a thing happen, it shall be paid at C.; this doth not make the estate conditional.

The proviso in the act of 1869 “stands originally by and of itself” and has “no dependence upon any other sentence”; “it is compulsory to the” grantee; “it comes on the part and by the words of the” grantor; “it is applied to the estate and not to some other matter.” Therefore, it answers every test of the rules laid down by Touchstone. A careful examination of these rules show that they find uniform support in all the early English decisions and may be treated as accurate expressions of the an-

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cient common law upon the subject. (Littleton's Tenures, Secs. 328-331; Coke upon Littleton, Secs. 328-331, 203 a. b., 204 a.; Cruise's Dig., vol 4, 352, 353, Tit. 32, ch. 25, Secs. 1-6; 3 Comyn's Dig. 74, 76, Condition A 2, A 4; Bacon's Abr. Vol. 2, Title, Condition A.; Sheppard's Touchstone, 121, 122).

The modern decisions are in harmony with the ancient authorities.

In Tiedeman on Real Property, 3 Ed., Sec. 201, we read:

No particular words or forms of expression are really necessary for the creation of such an estate. Any words, particularly in wills, which show the intention to annex a condition to the estate granted will be sufficient. Such phrases, however, as "on condition," "provided," "if it shall so happen," etc., are found in constant use, and, if resorted to, will ordinarily remove any doubt as to the grant being an estate upon condition.

In Warvelle on Vendors, 2 ed., Vol. 1, Sec. 445, it is said:

The use of technical words which in themselves import conditions will ordinarily be held to create the same, for technical words are presumed to be used in their legal sense unless there is a plain intent to the contrary.

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The technical words to which he refers are those mentioned above.

In the American & Eng. Enc. of Law, Vol. 6, 501, 502, it is said:

To create a condition, no particular form of words is necessary. Yet certain words, namely, "upon condition," "so that," and "provided," or their Latin equivalents are recognized as *apt and customary*. * * * If a condition is not created by one of the recognized terms, it should be followed by a clause of re-entry or a provision of forfeiture.

(Washburn on Real Property, Vol. 2, Secs. 938, 956; Tiffany on Real Property, Vol. 1, 162; Tiedeman on Real Property, 3d ed., Sec. 201; Stanley v. Colt, 5 Wall. 119; Adams v. Valentine, 33 Fed. 1; Mahoning County v. Young, 59 Fed. 96; Adams v. Ore Knob Copper Co., 7 Fed. 634, 640.)

Second. Apparent exceptions.

There are a number of cases which apparently constitute an exception to the foregoing rules, but a careful analysis of them will disclose that they are not in conflict. They may be divided into the following classes: .

(1) Those in which it was urged that the estate was upon a condition subsequent, but in which no words such as "provided," or "on condition," were

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used. *Wright v. Morgan*, 191 U. S. 55, illustrates this class.

(2) Cases in which the words “provided that,” or “upon condition” were used, but in connection with other words showing the grantor did not use them in their usual sense.

These cases deserve a little closer examination than those of the first class, and may be divided thus:

(a) Cases in which the grantor, being a trustee, was without authority to impose conditions; or the grantee was without authority to assume the burdens of conditions. *Sohier v. Trinity Church*, 109 Mass. 1, is typical of this class. There lands were held by a trustee and the limitations of the trust expressed or by necessary implication prohibited the imposition of conditions.

(b) Cases involving the interpretation of wills, the rule as to which differs from that as to private grants. *Stanley v. Colt*, 5 Wall. 119, is characteristic of this class. The devise in that case was followed by this provision:

Provided that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society.

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If this condition had been treated as a condition subsequent, it would have resulted in defeating the evident purpose of the devise. The court, in considering it, said:

As we have seen, a condition, if broken, forfeits the estate, and forever thereafter deprives the society of the gift. * * * On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who took the estate are bound to perform; and in case of a breach, a court of equity will interpose and enforce performance. The estate is thus preserved and devoted to the objects of the charity or bounty of the testator, even in case of a violation of the limitations annexed to it.

The court very properly held that the testator could not have intended to impose a condition which would defeat the purpose which he desired to serve.

In the case at bar a holding that the estate was upon a condition subsequent would not defeat the purpose of the grantor, but would subserve it.

(c) Cases involving grants to municipal corporations or charitable institutions in which provisions, conditional in form, restricted the use of lands granted to some specific purpose, such as a burial ground or the like.

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The case of *Portland v. Terwillinger*, 16 Ore. 465, comes within this class. The land was conveyed to the City of Portland as a resting place for the dead. If the condition had been enforced the land would have reverted to the grantor, the defendant in the case. Speaking to this point the court said:

The defendant would again become re-invested with the estate, including the tombs and their contents, and might exercise such control and dominion over them as any other private property is subject to. I feel safe in saying that such was not the intention of the parties to these writings at the time they were executed, and change of circumstances since they were made cannot affect their construction.

Green v. O'Connor, 18 R. I. 56, is another case which falls within this class. In that case property was granted to the town of Providence upon condition that it be used for the purpose of a highway. There was a statute of Rhode Island prohibiting a town from obligating itself to maintain or repair a highway; it was presumed, of course, that the grantor knew this and, hence, that it was not his intention to impose upon the town a condition which the law prohibited it from fulfilling. Unless the decision can be said to rest on this ground it is an exception to the rule with respect to grants to municipalities on condition that the land be used perpetu-

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ally for the purpose of a street. In *May v. Boston*, 158 Mass. 21, and *Rose v. Hawley*, 118 N. Y. 502, such a grant was held to be upon a condition subsequent.

(d) Cases involving grants containing provisions conditional in form, but which inure to the benefit of some person other than the grantor or his heirs.

The general rule is that grants upon condition for the benefit of some persons other than the grantor or his heirs are not treated as conditional estates. The case of *Countryman v. Deck*, 13 Abbott's Cases, N. Y., 110, belongs to this class. The condition in that case reads:

Provided always that the party of the second part shall fence and keep fenced the premises above described.

It was held that this proviso constituted a covenant running with the land, because the manifest intention of the parties was that it should benefit the grantee and his grantees and not the grantor or his heirs. They had no direct and exclusive interest in the preservation of the fence; and since they had not the court reached the conclusion that it was not the intention of the parties that the grantee should lose his estate if he failed to build or keep up the fence. The Government has a direct and exclusive

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interest in the enforcement of the actual settlers provision. It represented the public and the condition was made for the benefit of the public. No one else could enforce it and, hence, the inevitable conclusion that it was intended as a condition subsequent.

(e) Cases involving grants containing provisions conditional in form, but which, if construed to be conditions, would nullify other provisions of the grant. The case of *Episcopal City Mission v. Appleton*, 117 Mass. 326, exemplifies this class.

Is there any room for the application of such a rule in the case at bar? Section 2 of the act of 1866 provides that,

The lands herein granted shall be applied to the building of said road within the states respectively, wherein they are situated.

Defendants insist that this provision cannot be given effect if the condition subsequent theory prevails, hence, that there is an inconsistency. If so, it is only such an inconsistency as exists in every grant upon condition subsequent. If the condition be enforced in case of breach, the grantee will not, of course, be permitted to continue in the enjoyment of the grant. If such an inconsistency would prevent the enforcement of the condition subsequent here, such a condition would be futile in every case.

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(f) Cases in which conditions have been held to be void, on grounds of public policy, etc.

Conditions in total restraint of the power of alienation are held void and unenforceable, although conditions restraining the power of alienation for a limited period, or as to a particular class of persons are held valid. (Washburn on Real Property, Vol. 2, Sec. 944; Devlin on Deeds, Sec. 965; Warvelle on Vendors, 2 ed., Sec. 451; *Cowell v. Springs Co.*, 100 U. S. 55, 57; *Langdon v. Ingram*, 28 Ind. 360; *McWilliams v. Nisly*, 2 Serg. & R. 507.)

In *Taylor v. Brown*, 147 U. S. 640, 646, the court said:

The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeits his estate by violating it.

Even a total restraint of power of alienation is valid in case of public grants, although invalid in case of private grants. (*Sheppard's Touchstone*, 130.)

But, of course, such cases as these can have no application to a grant like the one we are considering. It will not do to say that an act of Congress, making a gift to a grantee upon condition that it do certain things, is against public policy.

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Every case in which the use of the words “provided,” or “upon condition,” were held not to import conclusively a condition subsequent, falls within some one of the foregoing classes and has no application to the case at bar.

Third. Cases in which the general rule has been applied and enforced.

Wherever the grant or the deed, as the case may be, introduce the condition by the words “provided” or “upon condition,” the estate has been held to be one upon condition, unless other language in the deed made it *clear* that the parties did not so intend.

In *Adams v. Valentine*, 33 Fed. 1, the court construed a deed, containing a condition opening with the word “provided.” It was asked to say that the deed fell within an exception to the general rule with respect to conditions subsequent. In answering this Judge Wallace said:

Nothing could be plainer or more peremptory than the words in the latter deed, “provided and this deed is upon condition that.” There is no room for construction, and there is nothing in the context of either of these deeds, which warrants any other than the ordinary meaning of the language employed.

Referring to the decisions which had been submitted to him in support of the opposite contention, he said:

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The instrument considered by the court in each of these cases contained language from which it was reasonable to infer that the clause under consideration was not intended to operate as a condition.

Ergo, where the instrument does not contain such language the general rule must apply. And that is what we are contending for here.

In *Clapp v. Wilder*, 176 Mass. 332, 335, where a similar question was under review, the court said:

The common law as to the creation of conditional estates has always been considered a part of our common law. *If we are to have such estates it is important that there should be the least possible uncertainty as to the form of the language to be used in creating them*; and when we find in a deed an intensified form of the phrase which from the earliest times has been regarded as “the most express and proper” phrase by which to create such an estate, it is to be assumed, in the absence of anything appearing in the deed to the contrary, that the phrase is used for its proper legal purpose, namely, to create such an estate, and that such an estate is thereby created. No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language; and *sometimes considerable*

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astuteness has been exercised in this direction (Post v. Weil, 115 N. Y. 361); and no doubt the language is sometimes used when, from the whole deed, it sufficiently appears that it could not have been intended in its full technical sense, and in such cases a restriction and not a technical condition is the result.

Concluding the discussion upon this point the court said:

The case at bar does not come within any exception to the general rule as to the legal meaning of the phrase “upon express condition.” As stated by Parker, C. J., in Gray v. Blanchard (8 Pick. 283, 287), the words, “this conveyance is upon condition” can mean nothing more nor less, than their natural import.
* * * It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether (p. 337).

In Blanchard v. Detroit, etc., R. Co., 31 Mich. 43, 48, 50, a conveyance was made “in consideration of \$500.00 and the covenant to build a depot hereinafter mentioned.” The so-called covenant reads:

But this conveyance is upon the express condition that the said railroad company shall build, erect and maintain a depot or station house on the land herein described, etc.

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It will be noticed that this provision is referred to as a covenant, but the court, looking to the intention of the parties, held that it was a condition subsequent. It said:

Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant (p. 51).

In *Hammond v. Railroad Co.*, 15 S. C. 10, 32, the deed under examination had these words, "provided always, on condition." Speaking of their effect the court said:

* * * When, then, Hammond has used the very terms which the books lay down as the special terms to be used to create such an estate, and when this was his interest, and nothing was found in the deed to negative the idea that

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it was also his purpose, why resort to implication? Why not take him at what he says? It seems to the court that it would be in violation of all rules of construction to hold otherwise than this deed created an estate upon condition.

In *Pepin County v. Prindle*, 61 Wis. 301, 308, land was conveyed to the County of Pepin “upon the express condition and term that the said County of Pepin erect thereon within five years a court-house for the use of said county, and shall keep and maintain the same thereon for the space of ten years, upon the express condition.” It was urged that the mere maintenance of the building was a sufficient compliance with the condition. The court answered this by saying:

Such a construction would do violence not only to the sense conveyed, but also to the language employed. It would be more narrow and technical than is implied in the word “strict” or “literal”; it would be extremely finical.

In *Langley v. Chapin*, 134 Mass. 82, the deed under consideration provided:

This conveyance is made by us upon condition that the said Corbitant Mills, or its successors, will erect or cause to be erected upon said premises a cotton factory of not less than 20,000 spindles within two years from the date hereof.

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Judge Holmes (now Mr. Justice Holmes), speaking for the court, said of this provision:

There is no doubt that it attaches a condition subsequent to the estate conveyed. The tenant argues that it amounts only to a personal covenant with the grantors. But there is nothing in the context which warrants any other than the natural interpretation of the words used, and we must therefore assume that they mean what they seem to.

From the foregoing cases it is clear that the words "provided," or "upon condition" import a condition subsequent unless there is strong ground for believing that the parties did not so intend.

Even in cases where those words are not used, if it is clear from the context, that it was the intention of the parties to create a condition subsequent the court will so decide.

Wilson v. Wilson, 86 Ind. 472, 474, illustrates this class of cases. In the conveyance construed the word "condition" did not appear. Speaking of this the court said:

The word "condition" is not necessary to the creation of a condition. Any words that convey the proper meaning will be sufficient; and when, as in this case, the conveyance was made upon specified terms, and for no other

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consideration, the terms stated must be regarded as expressive of conditions subsequent, a breach of which might forfeit the estate.

It is true that courts are reluctant to construe *private* grants to be conditional where the formal words are not used. In such cases the intention of the parties must be very clear, or else the court will refuse to hold the estate to be one upon condition.

Fourth. But it is otherwise with respect to public grants.

In *Northern Pacific v. Townsend*, 190 U. S. 267, the language of the granting act was "that the right of way through the public lands be, and the same is hereby, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed." Neither the word "provided" or "condition" was employed. In the case of a private grant it is probable that the court would have held that this provision did not create an estate upon condition, but in the case of a public grant it is otherwise. We read from the opinion:

But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin* case, 103 U. S. 426) "to those necessarily implied, such as that the road shall be
 * * * used for the purposes designed."
 * * * In effect the grant (of the right of

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way) was of a *limited fee*, made on an *implied condition* of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted (p. 271).

In *United States v. Michigan*, 190 U. S. 379, 398, the words were “for the purposes aforesaid and no other,” and the court held that they implied “a grant upon condition for a special purpose.”

In *Horner v. Chicago, etc., Ry. Co.*, 38 Wis. 165, 175, the court said:

This deed conveyed two parcels of land. After the description of the first parcel, and referring to it, are the following words: “The aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes.” After the description of the other parcel, which in terms is granted for a railway, the deed contains this clause: “Both of said pieces or parcels being granted solely for said road purposes.” The words “only” and “solely” are words of restriction or exclusion. As used in this deed, their effect clearly is to prohibit the grantee from using the lands for any other than the specified purposes.

Speaking further of the words of restriction used the court said:

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But their insertion was a useless act unless the clauses are held to be conditions. That the grantor intended to reserve to herself some remedy in case the grantee should make default, is too plain for argument or doubt.

So we say in the case at bar.

The decisions in all the foregoing cases, where formal words were not used, turn upon the interest of the grantor. Did he intend the provision for his protection? If so, then it is a condition subsequent. The Government determined to protect itself against a breach by the railroad company. Unless the actual settlers provision is treated as a condition subsequent the Government is without protection.

Fifth. Cases construing provisions similar to the actual settlers provision.

The number of cases in which the provisions similar to those in the act of 1869 were construed are not many.

In *Nichols v. Southern Oregon Co.*, 135 Fed. 232, the proviso in the grant read: "Provided further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and at a price not exceeding \$2.50 per acre." The suit was by a private individual to compel defendant to deed to him a portion of the land upon the terms and at the price specified in the

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grant. The court held that he had no rights under the grant. In the course of the discussion the court observed:

It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant.

Was this a *dictum*? The decision of the case required that the court should decide who was entitled to complain of the violations of the act. In doing so it found that complaint could be made only by the Government, because the grant was upon a condition subsequent. True, he spoke of the restrictions placed in the grant as “mere incidents, mere regulations,” but these are the same things which he afterwards denominated a condition subsequent.

In *Warrior River Coal and Land Co. v. Alabama State Land Co.*, 154 Ala. 135, the court interpreted the provisions of the act of April 10, 1869, renewing the grant to the State of Alabama under the act of June 3, 1856. This of course is not the act involved in the present suit, although bearing the same date. Its provisions, however, with respect to the sale of land, are the same:

Provided that the land mentioned by the act hereby revived, except mineral lands, shall be sold to actual settlers only, in quantities not greater than one quarter section to any one person and at a price not exceeding \$2.50 per acre.

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The court, speaking of the limitation quoted, said that it:

was at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only.

It may be this was *obiter*, but whether or not it was, it discloses the views of the court upon the subject, and for that reason is worthy of consideration in the matter which we are discussing.

Sixth. Cases construing provisions of public grants analogous to the case at bar.

There are a number of decisions construing provisions of public grants affirmatively requiring the settlement of the granted lands, by or the disposition of them to settlers. The provisions are in the form of a condition subsequent, and the courts sustain the natural and ordinary meaning of the words employed; in other words applied the general rule invoked by the Government in the case at bar. To illustrate:

In *Chapman v. Pingree* (67 Me. 198) a provision in a grant (in the ordinary language of a condition subsequent) requiring that the grantee should settle twenty-five families on the granted lands within a specified time, was held to be a valid condition.

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In *United States v. Repentigny* (5 Wall. 211) a provision in one of the old French grants requiring the settlement and improvement of the lands granted and the occupation thereof by the tenants of the grantee was sustained and enforced as a condition subsequent; and the lands were held to have been forfeited to the United States, as the successor of the King of France, because of a breach of such condition.

In *United States v. Wiggins* (39 U. S. 334) a provision in one of the old Spanish grants, in the form of a condition requiring settlement and improvement of the lands granted, was held to be a condition subsequent and enforced as such; and it was held that the United States, as the successor of the King of Spain, the original grantor, was entitled to forfeit the estate.

In *United States v. Arredondo* (31 U. S. 689) a provision in another old Spanish grant, in the form of a condition requiring the settlement of two hundred Spanish families upon the granted lands, was held to be a condition subsequent. In this case failure to perform the condition was excused, because rendered impossible of performance by a change of sovereignty before the expiration of the time prescribed for the settlement of the lands.

Conditions requiring settlement of the granted lands were common in the old French and Spanish

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grants. And it has never been contended or held that there was any ground for converting those conditions (which were *enforcible*) into mere personal covenants (which would be *unenforcible*).

Seventh. Provisions construing private grants analogous to the case at bar.

There are many cases in which provisions in private grants, similar to the actual settlers provision, were held to be conditions subsequent. Those grants contain provisions requiring or prohibiting the use of the granted lands in a certain manner or for a certain purpose. The authorities are practically unanimous that where these restrictions are expressed in the form of a condition, as for instance by the use of conditional words such as “provided” or “on condition,” they will be enforced as conditions. (Cowell v. Springs Co., 100 U. S. 55; Adams v. Valentine, 33 Fed. 1; Gray v. Blanchard, 8 Pick. 284, 287; Blanchard v. Detroit, etc., 31 Mich. 43, 48; Langley v. Chapin, 134 Mass. 82; Marston v. Marston, 47 Me. 495; May v. Boston, 158 Mass. 21; A. & E. Enc. of Law, vol. 6, p. 513 and cases cited; Tiedeman on Real Property (3d ed.), sec. 205.

Eighth. Rule disfavoring conditional estates not applicable to public grants.

In the case of private grants courts will try to avoid decreeing forfeiture wherever possible. This comes (1) largely from the desire to protect the

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weak against the strong, to guard the ignorant and unsuspecting against the unconscionable devices of those more learned and cunning. And (2) because of the desire to avoid the insecurity and uncertainty resulting from the existence of defeasible estates. But the enactments of Congress cannot be discounted upon either of these grounds. The judiciary has no duty to review the policy or wisdom of congressional acts where they are within the constitutional power of Congress. The condition created by the actual settlers provision, was designed to conserve the public welfare. It does not create permanent conditional estates. Its object is to prevent an undesirable distribution of the granted lands. It will not do to say, in construing grants by Congress, that the common law required this or that, and that Congress did not observe the requirement. The legislative branch of the Government may modify or even reverse the common law. When Congress by the use of appropriate words indicates a condition to a public grant, it becomes the law. How ridiculous it would be to say, after Congress has created a conditional estate, that such estate is not favored by the law. What Congress enacts, within its constitutional power, the law necessarily favors.

In *Farnsworth v. Minnesota*, 92 U. S. 49, 68, it was expressly decided that the general doctrine dis-

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favoring conditions and forfeitures is applicable to private contracts, but *not* to public laws. It held that equity would enforce forfeiture in favor of the public upon grounds of public policy, and quoted with approval these words of Lord Macclesfield:

You can never say that the law has determined hardly, but you may that the party has made a hard bargain.

The most careful research has failed to discover a single decision in which a provision in a public grant, such as we have here, was held not to be a condition subsequent.

Do the cases of *Morgan v. Rogers*, 79 Fed. 377, and *Davis v. Gray*, 16 Wall. 203, so hold? No. In *Morgan v. Rogers*, the grant recited that the lands were "to be held and used as a burial ground for said city and vicinity." The court said that these words constituted a mere statement of the reasons which induced Congress to make a grant of that exceptional character. It will be noted, however, that the grant did not contain the formal words found in the actual settlers provision. In *Davis v. Gray*, the grant involved was one from the State of Texas to aid in the construction of a railroad. The court held that the performance of the condition was rendered impossible by the State of Texas joining in the rebellion, and then said:

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Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the State herself. By plunging into war, and prosecuting it, she confessedly rendered it impossible for the company to fulfill during its continuance.

Manifestly these cases do not militate in the least against the Government's position. They are entirely consistent with it. We repeat, no case can be found in which the rule disfavoring conditional estates was held to be applicable to public grants.

IV.

BREACHES OF CONDITIONS IN ACTUAL SETTLERS PROVISION.

Under which will be discussed the character and extent of the transactions charged to be in violation and breach of the conditions restricting the manner of selling the granted lands, and certain excuses of the defendants.

First. Unlawful sales and time thereof.

In selling the granted lands the railroad company has always ignored the restrictions imposed by Congress. The lands have been disposed of solely with the object of deriving the greatest possible financial benefit therefrom. Many sales have been made to speculators in quantities from 1,000 to

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20,000 acres to a single purchaser, and for prices ranging from \$5 to \$40 per acre and one sale of 45,000 acres was made to one person at \$7.00 per acre. (Ante. p. 93.)

Of the granted lands, approximately 5,306 sales have been made, aggregating approximately 820,000 acres. Of this amount, about 524,000 acres were sold to 376 purchasers in quantities exceeding one quarter section to one purchaser. Substantially all of the 524,000 acres were sold to speculators. Of the 524,000 acres, approximately 370,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to one purchaser. (Ante. p. 94.)

For many years the limited demand for the lands furnished comparatively few opportunities to violate the terms of the grant, and thus it transpired that until about the year 1894, nearly all of the lands disposed of were sold in substantial compliance therewith. Yet during that period there were a few sales in quantities from 400 to 1,000 acres to a single purchaser. (Ante. p. 93.)

However, nearly all of the large violations have taken place since the year 1894, and after an active demand for the lands by speculators, in large quantities, had been developed by the Southern Pacific Company.

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Second. Trust deeds and mortgages.

The trust deed of June 2, 1881, purporting to create some preferential interest in the granted lands in favor of the owners of the so-called preferred capital stock of the Oregon and California Railroad Company, in terms confers upon the trustees the power to sell and dispose of the lands in violation of the conditions of the grants. It therefore constitutes a breach of the conditions. The same is true of the Union Trust mortgage of July 1, 1887. (Ante. p. 92.)

Third. Lands conveyed in effect to Southern Pacific Company.

The proof shows that through the manipulation of corporate securities and the maintenance of the Oregon and California Railroad Company as a dummy corporation to serve the defendant Southern Pacific Company, the entire land grant has been appropriated to the use and benefit of the latter company. The Southern Pacific Company has assumed and exercised all of the rights of ownership of the granted lands. Nominally, the title remains in the defendant Oregon and California Railroad Company, but this does not affect the actual nature of the transaction. The practical effect of the transaction is the same as if all the granted lands now remaining unsold had been conveyed to the Southern Pacific Company. If a dummy corporation is maintained to enable another corporation to exercise and enjoy certain franchises and other

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rights of property, the courts will inquire into the transaction and treat it the same as if the dominating corporation were the legal owner of the property held in the name of the dummy corporation. *Cook on Stock and Stockholders*, secs. 6, 663a, 857; *Vilas v. Page*, 106 N. Y. 439; *Bennett v. Minott*, 28 Oreg, 339; *San Francisco v. Bee*, 48 Cal. 398; *Barksdale v. Finney*, 14 Grat. (Va.), 338; *Metcalf v. Arnold*, 110 Ala. 108; *Van Campen v. Ingram*, 12 Atl. Rep. (N. J.) 537; *Terhune v. Skinner*, 45 N. J. Eq. 344.

Consequently the situation is, in legal effect, the same as if the unsold lands, aggregating approximately 2,360,492 acres, had been sold to the Southern Pacific Company. In any event the withdrawal of the lands from sale and the refusal to entertain applications therefor by actual settlers, constitute a further breach of the restrictions. (Ante. p. 95.)

Further discussion of this question for the purpose of showing that defendants breached the conditions of the grant is unnecessary. They frankly admit it. We take the following from the record:

MR. FENTON: Defendants admit that they would not have paid any attention to the proviso of April 10, 1869.

MR. TOWNSEND: Nor to the similar provision of May 4, 1870?

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MR. FENTON: Or to section 4 of the act of May 4, 1870, with respect to the limitation upon the grant. (R. V.-2369.)

In addition, the answers admit, substantially, all the acts charged by the complainant as breaches.

Fourth. The effect of these breaches.

The immediate effect of the transactions hereinbefore referred to is to create a virtual land monopoly affecting the territory within 35 or 40 miles of the Oregon and California Railroad line, and particularly from Eugene to the southern boundary line of the State. Substantially every alternate section is held in a single proprietorship. Industrial development is controlled by the railroad company. That in forty years every alternate section of land in southwestern Oregon should be held in a single proprietorship to serve selfish interests, without regard to the commercial and industrial development of the territory in which the lands are situated, is the specific evil, in a grossly aggravated form, that Congress intended to prohibit. It is unnecessary to elaborate upon this phase of the case. The court is referred to the observation of the Supreme Court, when considering the comparatively feeble provision of the Union Pacific grant, it said:

Anyone who has lived in a community where large bodies of land are withheld from use or

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occupation, or from sale except at exorbitant prices, will recognize the value of this provision. (Railway Company v. Prescott, 83 U. S. 603.)

Fifth. Excuses made by defendants for disregarding restrictions of the actual settlers provision.

(a) *Impossibility of performance.*

Much testimony was put into the record by the defendants upon the character of the land for the purpose of showing the land was not susceptible of actual settlement and therefore that the actual settlers provision is inapplicable. The government objected to all such testimony on the ground that it was immaterial, irrelevant and incompetent (Ante. p. 101) and still insists upon the objection.

When the grantees accepted the grants they knew the condition of the lands. The same hills were there that appear in their photographic exhibits. Substantially the same character of timber covered the surface. The grantees knew then as well as they know now the uses to which the lands could be put. If they were not susceptible of actual settlement or the grantees had any doubt about it, the grantees should have protected themselves either by not accepting the grants or by asking to have them amended; not having done so they are bound by their terms. In *Ingle v. Jones*, 69 U. S. 763, the defendant in error had made a contract to construct a building and "make it fit for use and occupation."

DEFENDANTS MEND THEIR HOLD.

Defendants stipulated that they withdrew the land from sale and refused to accept applications to purchase "claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose" (Stip. IV-1582). This was their position before litigation commenced. They now urge numerous other reasons for withdrawing the land from sale. This they cannot do. In *Ohio and Miss. Ry. Co. v McCarthy*, 96 U.S. 258, it is said,

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his mind and put his conduct upon another and different consideration. He is not permitted thus to mend his hold; he is estopped from doing it by a settled principle of law."

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He built it, as provided in his agreement, but owing to a latent defect in the soil upon which the foundation rested the building cracked and part of it threatened to fall. This made it necessary to take the building down and rebuild the structure, which was done at a large expense. The contractor, defendant in error, contended that having fulfilled his contract, he was not responsible for defects arising from a cause of which he was ignorant and which he had no agency in producing and therefore was entitled to recover the balance due upon the contract. The court in denying his claim said:

This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. (Citing authorities.)

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(b) *In any event the terms with respect to the quantity and price are enforceable.*

Assume for the purpose of the argument that these lands are incapable of cultivation, and that this fact would excuse the defendants from selling to actual settlers. It would by no means follow that the defendants would also be excused from observing the other restrictions, namely, those with respect to the quantity that might be sold to one person at a sum not to exceed \$2.50 per acre. These conditions are not impossible of performance, yet the defendants have ignored them.

Is there any warrant in the legislation of Congress for assuming that if these lands be incapable of cultivation the grantees may sell them in such quantities and at such prices as they please without any reference to the restrictions of the grant? We have shown (*Ante*. p. 153 *et seq.*) what the policy of the government was with respect to the disposition of the public domain at the time the acts of 1869 and 1870 were passed. No support can be found in that policy for the contention that if these lands be timber lands Congress did not intend to put any restraint upon the grantees with respect to their disposition.

In addition to what we have already said upon this question, we invite attention to the act governing the sale of timber and stone lands in California,

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Oregon, Nevada and in Washington Territory, approved June 3, 1878. It provides:

That surveyed public lands of the United States within the states of California, Oregon, and Nevada * * * may be sold to citizens of the United States * * * in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.

It further provides:

That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate * * * setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone * * * that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.

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This shows not only the policy but the practice of the government with respect to timber and stone lands.

Another act that is very pertinent. On March 3, 1869, a little more than a month before the amendatory act of 1869 was enacted, Congress passed what is known as the "Coos Bay Military Wagonroad Grant" to aid in the construction of a wagon-road from Roseburg to Coos Bay in Oregon. When this bill was under discussion Senator Williams of Oregon said:

I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable waters of Coos Bay. * * * There are some small valleys in these mountains in which the land may be worth something, and it is possible that there may be some timber on the mountains that may be used by the State in the construction of this road with advantage. (Cong. Globe, pp. 249-250.)

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Notwithstanding this description, Congress embodied in the act the following provision:

Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and at prices not exceeding \$2.50 per acre. (15 Stat. 340.)

There is nothing there about actual settlers, yet the quantity that might be sold to one person and the price per acre are limited.

So, if we say these lands are chiefly timber lands that would not justify the conclusion that Congress did not intend to apply to them the limitations with respect to the quantity and the price expressed in the actual settlers provision of the grants of 1869 and 1870.

Moreover if Congress intended to exempt the timber lands it would have used apt words to do so—it would not have left the matter to surmise. It excepted mineral lands from the operations of the grants, hence it considered lands which it did not wish to come within the scope of the acts. It knew, too, that these lands had timber on them, because it granted by section 10 of the act of 1866 so much of the timber on the excepted mineral lands as the grantees might need in the work of construction (Ante. p. 41). Notwithstanding all this Congress

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did not except the timber lands. Are we justified, therefore, in concluding that Congress did not intend to exempt them, but did intend that they should be subject to all the restrictions of the acts of 1866, 1869 and 1870.

(c) *But the lands are susceptible of actual settlement.*

While insisting that the character of the lands is immaterial, we contend that the evidence shows overwhelmingly that they are susceptible of settlement (we have discussed the question as to what is meant by actual settlement, Ante. p. 136, and will not repeat our argument here). The defendants called thirty-three witnesses upon the character of the lands. A large number of them were persons who had been sent upon the lands by the Railroad Company for the purpose of gathering testimony favorable to their employer after the agitation for the recovery of the lands had commenced. To say the least, those who were thus sent were deeply interested and their testimony should be considered in the light of that fact. They said that from four to sixty per cent of the land when cleared would be fit for agricultural purposes and the balance for grazing (Ante. p. 103). This does not comport with the contention that none of these lands, or practically none of them, is susceptible to actual settlement or cultivation. On the other hand the government

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produced seventy witnesses—men who were familiar with the land through residence in the neighborhood and who were entirely disinterested excepting insofar as they might have desired to see the law enforced and the rights of the government vindicated. Forty-five of them said that all of the land was fit for settlement. The remaining twenty-two put the percentage a little lower. If the court should undertake to weigh the testimony of these men against that of the defendants' witnesses it seems to us that the contention of the defendants that these lands are not susceptible to settlement must inevitably fail.

In addition, the defendants' witnesses testified that there were from four million to twenty-five million feet of timber on each quarter section and that it was worth from \$1.00 to \$2.50 per thousand feet to lumber companies which would remove it without expense to the owners of the land. This means that a quarter section of land purchased for \$400.00, assuming that the maximum price of \$2.50 per acre was paid, would bring from \$4,000 to \$62,500 (*Ante*. p. 104); such a sum would go a long ways towards paying for the removing of the stumps and the clearing of the land. Under these circumstances who can doubt that the lands would be rapidly settled if the Railroad Company com-

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plied with the terms of its contract with the government.

But there is other persuasive testimony that these lands are fit for agricultural purposes. The defendants contend that they are chiefly timber lands. Very well; lands which will grow timber will grow fruit trees, grain, and other agricultural products. This must be manifest. Surely such lands cannot be classed as arid. The admission, therefore, that they are chiefly timber lands proves conclusively that when cleared they will be fit for agricultural purposes.

In addition we have the uncontradicted testimony of Mr. McAllaster, Land Commissioner of the defendant company, that 10,000 people, between the years 1907 and 1912 had applied to the company to purchase sections of this land for the purpose of cultivating the same and building homes thereon. He said:

About 10,000 applications to purchase quarter sections of timber lands belonging to the company at \$2.50 per acre have been made to the company and refused since the commencement of the first Lafferty suit, about that time, up to July 30, 1912. (R. IV-1958, 9.)

True, he added that in his judgment these applicants were not in good faith. In passing, we may

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remark with respect to this, that it has been the fashion during many years for the representatives of large corporations when called to account by the government for violations of law, to charge bad faith. They seemed to think that they had the right to flout the laws of the nation and that if anyone had the temerity to complain he must necessarily have been in bad faith. But that time is rapidly passing. For years large aggregations of wealth under corporate forms were permitted to ignore the laws; it is so no longer. In every quarter there is a demand that they be required to yield obedience to the will of the State as other citizens are required to do. And the charge that men who seek to make them do so are actuated by bad faith has lost its potency. If Mr. McAllister doubted the good faith of the 10,000 applicants he could have put it to the test in a very simple way, namely, by accepting the money tendered by them, or by offering to accept it. If upon doing the latter the offer was withdrawn he would have more convincing proof of bad faith than he has now.

Besides, we have a stipulation solemnly entered into that 4,000 persons had applied for permission to actually settle upon this land and pay for it at the maximum price of \$2.50 per acre, and that their applications were denied (*Ante* p. 95). In view

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of these facts how futile it is to argue that the lands are not susceptible of actual settlement. Such a contention must fall upon ears that are deaf while the 10,000 applicants who seek access to the lands knock for admission upon doors that are barred against them by the defendants. Let the Railroad Company put these lands upon the market for sale within the terms of the grants and it will be demonstrated within a short time that there are thousands upon thousands of people who are willing to take them and establish their abodes thereon. If that were done what is now a wilderness would become a land of homes filled with happy and prosperous people.

V.

REMEDIES—JURISDICTION.

Under which will be discussed the remedies available to the Government and the question of jurisdiction raised by the defendants.

Is forfeiture the proper remedy and has equity jurisdiction to decree it? Defendants contended:

First. That forfeiture could not be resorted to without (a) declaration of forfeiture by Congress, and (b) a judicial proceeding thereafter analogous to the proceeding known at common law as "inquest of office."

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Second. That equity should refuse to entertain this suit because the principal object thereof is to enforce a forfeiture.

Third. That the suit should not be entertained as one to quiet title, because such a suit can be maintained only when the plaintiff has both legal title and possession.

We shall consider these propositions in the order named.

First. This suit may be maintained without inquest of office; the act of Congress authorizing the Attorney-General to bring it is sufficient.

(a) *Underlying principles of conditional estates.*

The theory of conditional estates is, that the grantor parts with the title reserving the right to recall the same upon the happening of the contingency named. Therefore, a condition subsequent is not self-executing. It rests with the grantor to say whether the condition shall become operative after the happening of the contingency. And so, a violation of a condition does not terminate the estate of the grantee, unless the grantor so elects. Conditions are designed for the benefit of the grantor, not for the benefit of the grantee.

Conditional estates being of feudal origin, the early rules defining the rights and remedies incident to conditional estates were influenced by the

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general doctrines of feudal tenures. Originally a freehold estate could be created only by *feoffment* with *livery of seisin*. Therefore it was held that it could be terminated only by some act of equal notoriety and solemnity. Thus it became the rule that the grantor could exercise the right of election to forfeit a freehold estate for breach of a condition only by an actual entry upon the land. Such entry being considered the equivalent of the livery of seisin by which the estate had been created. (Tiffany on Real Property, vol. 1, sec. 74; Davis v. Gray, 16 Wall. 203, 230; Cornelius v. Ivins, 26 N. J. L. 376, 386.)

(b) *Modern rule upon the subject.*

In time grants became recognized as a proper method of creating and conveying freehold estates. Livery of seisin not being required in the case of grants, the reason for the original rule requiring actual entry in case of a breach of a condition disappeared and with it the rule itself.

In *Schlesinger v. Railway Company*, 152 U. S. 444, the court said:

In the case of a private grant, an entry by the grantor, or any part equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required. (p. 453.)

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In *Union Pacific v. Cook*, 98 Fed. 281, 284, Judge Thayer, speaking for the Circuit Court of Appeals, said:

It is true, no doubt, that the grantor of an estate upon a condition subsequent is no longer bound to make a formal entry for breach of the condition, but may sue to recover the possession if the condition is not fulfilled within the time limited. According to the modern view, the *commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession.* (*Cowell v. Springs Co.*, 100 U. S. 55, 58; *Ruch v. Rock Island*, 97 U. S. 693, 697; *Austin v. Cambridgeport Parish*, 21 Pick. 215, 224; *Cornelius v. Ivins*, 26 N. J. Law, 376, 386; *Jackson v. Crysler*, 1 Johns. Cas. 125; *Tied. Real Prop.*, Sec. 277; *Hopk. Real Prop.* p. 174.)

(c) *Rules defining the manner in which the right of forfeiture for breach of a condition subsequent might be exercised by the King of Great Britain.*

In England it became the general doctrine that the right to forfeit an estate for breach of a condition annexed thereto could be exercised by the King only by a special proceeding known as “inquest of office.” If the inquest resulted in favor of the Crown, the finding of the jury was known as “office

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found,” and the legal effect thereof was the same as a re-entry by an individual. This rule was not absolute. Under certain circumstances, an inquest of office was not necessary, as we shall see in a moment.

(d) *Inquest of office—where necessary.*

It would serve no useful purpose to investigate the origin and trace the development of the proceeding known as “inquest of office.” Let it be sufficient to say that in the course of time it became established that where the right of the King to the possession of lands appeared as a matter of *record*, no inquest of office was necessary, and the King’s possession was presumed from the mere existence of the record showing the right. (Viner’s Abridgement, title “Office or Inquisition,” [G 2] 6, vol. 16, page 88; Bacon’s Abridgement, title “Prerogatives,” vol. 8, page 100; Chitty’s Prerogatives of the Crown, page 249.)

Therefore, in a case such as the one at bar, inquest of office would not have been necessary under the old common law. The grant to the railroad company was by a public statute and appeared of record. The conveyances by the defendant in violations of the conditions of the grant appeared of record in the State of Oregon. Consequently, even if the doctrine of inquest of office be in force here, there was no occasion for its application. But, as

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we shall see, inquest of office is a proceeding not applicable to the Government of the United States.

(c) *Inquest of office, how initiated.*

There were two officers of the Crown who, by virtue of their office, had general authority to institute inquests of office on behalf of the Crown, viz., the sheriff and the coroner. Either of these officers might at any time summon a jury and submit to them either general or specific questions concerning the property rights of the King. But they were not the only ones possessing this power. A court of *chancery* had the power to appoint special inquisitors, when it was thought necessary, but in each case their duties were the same as those selected by the sheriff or coroner. They conducted a mere investigation and returned their findings to a court of *chancery*.

(f) *General nature of the proceeding.*

Inquests of office were not trials in any sense of the word. The verdicts returned did not possess any of the elements of a judgment or decree. There were no pleadings. The proceedings were based, not upon an allegation, but upon an inquiry. It was not necessary, in order to conduct an inquest of office, to acquire jurisdiction either as to parties or as to the subject-matter. An inquest of office was in every sense analogous to the modern coroner's inquest. In fact, coroners' inquests were inquests of

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office at the common law. A verdict favorable to the Crown did not assume to adjudicate the rights of the Crown.

In *Phillips v. Moore*, 100 U. S. 208, 212, the court thus described the legal effect of an “office found”:

It removed the fact upon the existence of which the law divests the estate and transfers it to the Government, from the region of uncertainty, and makes it a matter of record.

(*Chitty's Prerogatives of the Crown*, p. 59; *Blackstone's Commentaries*, Book III, p. 259; *Pollock and Maitland's History of English Law*, vol. 1, p. 119-122; *Gilbert's History of the Exchequer*, p. 109, 132, *et seq.*; *Hamilton v. Brown*, 161 U. S. 256, 263.)

(g) *The manner in which right of forfeiture for breach of conditions may be exercised by the United States.*

The law requires from the Government only such act as will show its intention to avail itself of the condition. This can be done only by Congress. Sometimes Congress manifests the intent by passing an act declaring a forfeiture; in other instances, as here, it authorizes a suit to be brought to have the forfeiture declared and the condition enforced. The method of procedure has been passed upon often by

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the Supreme Court and in no case was it held that inquest of office, or anything similar to it, was necessary before commencing the action.

In *United States v. Repentigny* (72 U. S. 211) the court said:

A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly, under authority of the Government, without these preliminary proceedings.

In *Schulenberg v. Harriman*, 88 U. S. 44, we read:

If the grant be a public one, it must be asserted by judicial proceedings *authorized by law*, the equivalent of an inquest of office at common law, finding the fact of forfeiture and *adjudging the restoration of the estate* on that ground, *or there must be some legislative assertion of the ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.*

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In *Farnsworth v. Minnesota*, 92 U. S. 49, it was said:

A forfeiture by the State of an interest in lands and connected franchises granted for the construction of a public work may be declared for noncompliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned and is made by a law which expressly provides for the forfeiture when that object is not accomplished. *Where lands and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee, such as an act resuming control of them and appropriating them to particular uses, or grant-*

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ing them to others to carry out the original object, will be equally effectual and operative. [The court citing *United States v. Repentigny* and *Schulenberg v. Harriman*].

In *Bybee v. Oregon and California Railroad Co.* (139 U. S. 663) the grant involved in the case at bar was considered. The court said:

And in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government itself to take advantage of it, and forfeit the grant *by judicial proceedings, or by an act of Congress, resuming title to the lands.*

Iron Mountain R. R. Co. v. Memphis, 96 Fed. 113, decided in 1899, was a suit in equity to enjoin the City of Memphis and its legislative council from enforcing a forfeiture.

We take the following from the opinion of Judge Taft:

Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not, of itself, divest title and right of possession, but the power is in the sovereign, as grantor, *to manifest his will that the condition*

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shall be enforced, and this manifestation of his will is by *legislative action*. In this case the condition expressly requires that the council shall exercise an option before forfeiture should ensue. In exercising such an option the council is acting in a legislative capacity. Its declaration is a law.

Columbia Valley R. Co. v. Portland, etc. (162 Fed. 603). Decided in 1908. By act of March 3, 1875 (18 Stat. 482), Congress granted the right of way through the public lands to railroad companies upon certain terms and conditions, and among others, that the railroad should be constructed within five years from the time of the appropriation of the right of way by the filing of map of survey in the office of the Secretary of the Interior. By act of June 26, 1906 (34 Stat. 482), Congress declared forfeited to the United States all grants of right of way and station grounds under the act just mentioned, in cases where the railroad company had failed to construct its railroad within the time required. The question before the court was whether this was a proper exercise of the right of forfeiture on behalf of the United States. The opinion was written by Judge Gilbert, who said (page 606):

The question arises whether this act operated *ipso facto* to forfeit the right of the appellant to any section of its located road not com-

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pleted within five years from the date of the location. The appellant denies that it has that effect, and contends that, *in addition to the act, there must be a judicial ascertainment of forfeiture by a procedure in the nature of an inquest of office*, citing *Fairfax v. Hunter* (7 Cranch, 603, 3 L. ed. 453), *Smith v. Maryland* (6 Cranch, 286, 6 L. ed. 225), and *United States v. Repentigny* (5 Wall. 211, 18 L. ed. 626); and argues that while an act of Congress declaring forfeiture unconditionally may be sufficient where no facts are to be ascertained, the forfeiture here, under the act of June 26, 1906, which is to be enforced only where the road has not been constructed within the five years following the location, or where the construction of the railroad was not progressing in good faith at the date of the approval of the act, leaves two important questions to be decided before the forfeiture is to take effect. But these questions so suggested are questions of fact of the nature of those which are to be determined in any case where the inquiry is whether particular rights under a grant have been forfeited under the provisions of a forfeiture act. *The act itself takes the place of the adjudication of forfeiture and of the inquest of office.* It is the “legislative assertion of ownership of the prop-

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erty for breach of condition.” *It is itself the entry of the grantor for condition broken.*

Judge Gilbert then discussed the leading authorities upon this subject, including all of those hereinbefore referred to. The opinion in this case is very instructive upon this general question, and supports the contention of the Government in the case at bar.

(See also: *Cooke v. United States*, 91 U. S. 396; *United States v. DeVisser*, 10 Fed. 642, 647; *United States v. Campbell*, 10 Fed. 816, 821; *Cotton v. United States*, 11 How. 228, 231; *Smith v. Maryland*, 6 Cranch 286; *McMicken v. United States*, 97 U. S. 204, 217; *Van Wyck v. Knevals*, 106 U. S. 360, 368; *St. Louis, etc., R. Co. v. McGee*, 115 U. S. 469, 473; *United States v. California, etc., Land Co.*, 148 U. S. 31; *Schlesinger v. Railway Company*, 152 U. S. 444, 453; *United States v. O. & C. R. R. Co.*, 164 U. S. 526; *Atlantic & Pacific v. Mingus*, 165 U. S. 413, 431, 434; *New York Indians v. United States*, 170 U. S. 1, 24; *United States v. Tennessee, etc., R. Co.*, 176 U. S. 242, 256; *United States v. Northern Pacific*, 177 U. S. 435, 441.)

(h) *Trial by jury not required.*

The contention by defendants that the Government can assert a right of forfeiture only through the finding of a jury made before the institution of suit, is based upon the assumption that the pro-

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ceeding "inquest of office" is applicable to the United States. They say that inquest of office involved a jury trial and that the constitution of the United States preserves for them the right to such a trial in a case of this character. The trouble with this argument is that the proceeding inquest of office, as we have shown, does not apply to the United States and even if it did, it was but a special proceeding and not within the purview of the constitutional provision preserving due process of law. Besides, during the last 120 years the United States has brought many actions to forfeit grants for breaches of conditions and not in a single instance was inquest of office resorted to or considered necessary.

..

Due process of law carries with it the right of trial by jury when trial by jury has been the usual course of administration in the particular class of cases through courts of justice to which the one in question belongs. That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through courts of justice at the time the constitution was adopted.

Hurtado v. California, 110 U. S. 535; Light v. Canadian County Bank, 2 Okla. 551.

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(i) *Congress authorized forfeiture.*

Congress has not declared a forfeiture in the case at bar, but it has authorized and directed the Attorney-General to do so. It said in the act, authorizing him to bring this action, that he was “authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to” the acts in question granting lands, etc., “and in and by any and all such suits, actions, or proceedings, * * * in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts, respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being *intended to fully authorize* the Attorney-General in any by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceed-

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ings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to *such forfeiture* or forfeitures, and *if found to enforce* the same.”

The bringing of the pending suit, in pursuance of that authorization, is the equivalent of a declaration by Congress itself of a forfeiture.

In *Ruch v. Rock Island*, 97 U. S. 693, 697, it was said:

Bringing suit for the premises by the proper party is sufficient to authorize a recovery, without actual entry or a previous demand of possession.

In *Union Pacific v. Cook*, 98 Fed. 281, 284, Judge Thayer, speaking for the Circuit Court of Appeals, said:

The commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession.

The foregoing authorities amply sustain the proposition that the institution of legal proceedings authorized by Congress is a sufficient exercise of an election to claim a forfeiture.

Second. The fact that the practical relief prayed for is to enforce a forfeiture is not a ground for equity to refuse to exercise its jurisdiction.

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(a) *Exceptions to the general rule.*

The general rule that equity will refuse to enforce forfeitures is not absolute. It will enforce them where the plaintiff is without an adequate remedy at law.

In *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, Judge Van Devanter, speaking for the court, discussed this question as follows:

Both because forfeitures are *usually* harsh and oppressive, and because they can *ordinarily* be enforced at law, courts of equity *generally* refuse to aid in their enforcement (Citing many federal decisions). This has been at times declared to be an absolute and inflexible rule, as in *Marshall v. Vicksburg* (15 Wall. 146) where it is said: "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." And at other times it has been stated with some qualification, as in *Henderson v. Carbondale Coal & Coke Co.* (140 U. S. 25), where it is said: "Equity always leans against them, and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto." *The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cog-*

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nizable in equity there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. As said by Story (Eq. Jur. Sec. 439): “The beautiful character of pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes.” In *Brown v. Vandergrift* (80 Pa. 142, 148), a case involving the forfeiture of an oil lease, it was held by the Supreme Court of Pennsylvania: “In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity and protects the land owner against the indifference and laches of the lessee and prevents a great mischief.” *Glocke v. Glocke*, 113 Wis. 303.

Memphis, etc., R. R. Co. v. Neighbors (51 Miss. 412) is not an exception to this rule. In that case the defendants were in actual possession and consequently the plaintiff had an adequate remedy at law.

In *Vicksburg, etc., R. R. Co. v. Ragsdale* (54

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Miss. 200, 208), it was held that if the plaintiff be without adequate remedy at law, equity will entertain a suit to quiet a title, even though it depend on a forfeiture.

In *Lafayette County v. Hall* (70 Miss 678), it was held that the general rule against the enforcement of forfeitures in equity is not applicable when the right of forfeiture is based upon a statute.

(b) *The general rule is not applicable to forfeitures asserted by the Government.*

The general reason underlying the doctrine that equity will not aid in the enforcement of forfeiture is that forfeitures are usually harsh and oppressive. From the nature of things, the rule cannot be applicable to acts of the Government, in the discharge of governmental functions, for the conservation of the general public welfare. The Government never inserts conditions in its grant for the purpose of pecuniary gain, or for the purpose of obtaining an unconscionable advantage over those dealing with it.

(c) *The rule in England.*

One of the chief functions of the chancery and the exchequer was to ascertain and enforce all property rights of the King, including those accruing by forfeiture and escheats. This we have already shown in our discussion under the head of inquest of office. Equity lent its writs for the express pur-

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pose of doing that without which a forfeiture in favor of the King was impossible. [Ante. p. 248 *et seq.*].

(d) *Rule in the United States upon the subject.*

In *Farnsworth v. Minnesota* (92 U. S. 49) we read:

It is said that provisions for forfeiture are regarded with disfavor and construed with strictness and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law. "Where any penalty or forfeiture," says Mr. Justice Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will" (Story's Eq. Jur., sec. 1326). The same doctrine is asserted in the case of *Peachy v. The Duke of Somerset*, reported in the 1st Strange, and in that of *Keating v. Sparrow*, reported in

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1st Ball & Beatty. In the first case Lord Macclesfield said that “cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain.” In the second case, Lord Manners, referring to this language and taking the principle from it, said that “it is manifest that in cases of mere contract between parties this court will relieve when compensation can be given; but against the provisions of a statute no relief can be given.

The court further held that where a forfeiture is sought to be enforced to enable the Government to discharge some important function, not only does the general rule against the enforcement of forfeitures not apply, but in such case a court of equity will lend its jurisdiction upon grounds of public policy.

The conditions in the grant under examination were inserted to conserve an important public policy, namely, to prevent land monopolies and to promote a distribution of the public lands in a manner consistent with the permanent industrial welfare of the nation.

(e) *The general doctrine that equity will not entertain a suit to enforce a forfeiture is not ap-*

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plicable when the right of forfeiture is based upon a statute, as distinguished from a private contract.

If the United States is entitled to a forfeiture in the suit at bar, it is not by virtue of a transaction analogous to a contract between private parties, but is based upon a positive law enacted by Congress.

In *Lafayette County v. Hall*, 70 Miss. 678, the court said:

Equally untenable is the position assumed by counsel for appellees that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to mark the distinction between statutory penalties and penalties created by contract between private persons. The latter, courts of equity refuse to enforce; but the former, the expression of the will of the law-making power, the *courts of equity will not undertake to disregard and nullify by refusing their aid in proper cases.*

To the same effect see: (Pomeroy's Equity Jurisprudence, vol. 1, sec. 458; Story's Equity Jurisprudence, sec. 1326; *Clark v. Barnard*, 108 U. S. 436; *Powell v. Redfield*, 4 Blachf. 45; *Fed. Case No. 11359*; *Chapman v. Oregon*, 5 Oreg. 432, 436.)

Third. This suit is maintainable (a) as a suit to quiet title, and (b) as

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a suit to determine adverse claim to real property under Section 516 of the Annotated Codes of Oregon.

The United States is entitled to enforce its rights of property and other contract rights by all of the methods that are available to private individuals.

In *Cotton v. United States*, 11 How. 228, the court said:

Although, as a sovereign, the United States may not be sued, yet, as a corporation or body politic, they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws.

(a) *This suit should be entertained as a suit to quiet title under the general doctrines of equity jurisprudence.*

To quiet a title, or remove a cloud therefrom, has always been one of the leading heads of equity jurisprudence. There is but one general limitation upon the right to maintain a suit to quiet title, and that is the general limitation applicable to all suits in equity, namely, plaintiff must be without an adequate remedy at law. This rule is sometimes carelessly stated to the effect that a suit to quiet title can only be maintained where the plaintiff has both legal title and possession. This is not correct. If he holds both under circumstances which would prevent him from having an adequate remedy at law, equity will give relief. (32 Cyc. p. 1337.)

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(b) *Possession by plaintiff not necessary when lands are vacant and unimproved.*

If the lands be vacant and unimproved, as they are here, ejectment will not lie, and no other common law remedy is available. In such a case there is not only an inadequacy, but a total lack of remedy at law.

In *Christy v. Springs*, 11 Okla. 710, the court said:

However, independent of the statute, an action to quiet title may be maintained by the holder of the legal title where he is not in possession, if the premises are vacant and unoccupied.

In *Douglas v. Nuzum*, 16 Kas. 515, Judge Brewer, speaking for the court, declared that under the general principles of equity jurisprudence, independent of a statute, a suit to quiet title may be maintained even though the plaintiff is not in possession, if the premises are vacant and unoccupied.

In *Davenport v. Stephens*, 95 Wis. 456, the Court said:

Some question was raised whether the plaintiff has shown such possession as should entitle her to maintain this action. It is entirely immaterial whether she was in the actual possession or not. No other person was in the actual

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possession. (Grand Rapids, etc. v. Sparrow, 36 Fed. 210; Southern Pacific v. Goodrich, 57 Fed. 879; Taylor v. Clark, 89 Fed. 7; Holland v. Challen, 110 U. S. 15; O'Brien v. Crietz, 10 Kas. 202; Uteley v. Fee, 33 Kas. 683; Hoffman v. Woods, 40 Kas. 382.)

(c) *Question of possession is immaterial when the common law remedies are inadequate.*

The common law remedy of ejectment is not always adequate. Therefore, even in cases where the defendants are in possession, equity will entertain a suit to quiet title, if under the circumstances of the case the common law remedies are inadequate.

In O'Hara v. Parker, 27 Oreg. 156, 170, it was expressly held that a party out of possession may maintain a suit to quiet title to vacant lands, under the general principles of equity jurisprudence, when for any reason the remedies at law are inadequate. This case contains also a valuable discussion of the distinction between actual and constructive possession in cases of this character.

(A. & E. Ency. of Pl. & Pr., vol. 17, page 311; Bunce et al. v. Gallagher et al., 5 Blatchf. 481; Sayers et al. v. Burkhardt et al., 85 Fed. 246; Smith v. Zimmerman, 85 Wis. 542; Kruczinski v. Neuendorf et al., 99 Wis. 264; Nixon v. Walter, 41 N. J. Eq. 103; Beedle v. Mead, 81 Mo. 297; Hamilton et al. v.

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Batlin et al., 8 Minn. 403; King v. Carpenter, 37 Mich. 363; Jackson v. Cooper et al., 10 Tenn. 524.)

The suit at bar comes within the foregoing principles. Even if the defendants were in the actual possession of the lands, an action in ejectment would be inadequate to grant the relief claimed. This must be clear. A court of law would be unable to prevent defendants from mortgaging or conveying the land pending the suit. It could not adjudicate the rights of the Union Trust Company and Stephen T. Gage, or the rights of the cross-complainants or interveners. When equity is properly invoked on any ground, jurisdiction will be retained to adjudicate and enforce all the rights of the parties to the suit. (Ober v. Gallagher, 93 U. S. 199; Gormley v. Clark, 134 U. S. 338; Sunflower Oil Co. v. Wilson, 142 U. S. 313; Hopkins v. Grimshaw, 165 U. S. 342; Sill v. Solberg, 6 Fed. 468; Hayden v. Snow, 14 Fed. 70; Pacific R. R. v. Atlantic & Pacific, 20 Fed. 277; North British, etc., v. Lathrop, 63 Fed. 508.)

(d) *This suit should be entertained as a suit to determine adverse claims to real property under the provisions of section 516 of the Annotated Codes of the State of Oregon, which reads:*

Any person claiming an interest or estate in real estate, not in the actual possession of another, may maintain a suit in equity against

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another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests or estates.

In *Wehrman v. Conklin*, 155 U. S. 314, the court, speaking of statutes of this class, said:

This method of adjusting titles by bill in equity proved so convenient that in many of the States statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

In *More v. Steinbach*, 127 U. S. 70, the bill of complaint contained no allegation of possession by the plaintiff. Objection was urged upon this ground. In speaking to the point the court said:

As to the want of any allegation in the complaint of possession by the plaintiffs, or any evidence of that fact in the proofs, it is sufficient

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to say that by Section 738 of the Code of Civil Procedure of California, a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or interest in the premises. *People v. Center* (66 Cal. 551). A statute of Nebraska, authorizing a similar suit by a plaintiff out of possession, was before this court for consideration in *Holland v. Challen* (110 U. S. 15), and the jurisdiction of a court of equity to grant the relief prayed in such case was sustained. (Citing several Supreme Court decisions.)

The following authorities hold unqualifiedly that statutes like that of Oregon may be taken advantage of by suits in equity instituted in Federal Courts. *Holland v. Challen*, 110 U. S., 15; *Reynolds v. Crawfordsville Bank*, 112 U. S., 405; *Gormley v. Clark*, 134 U. S., 338; *Whitehead v. Shattuck*, 138 U. S., 146; *Wehrman v. Conklin*, 155 U. S., 314, 323; *Bardon v. Improvement Co.*, 157 U. S., 327.

(e) *What is actual possession?*

In *O'Hara v. Parker*, 27 Oreg., 156, the court, after defining constructive possession, said:

This is possession in law which follows in the wake of title, and is distinguished from actual possession,—*pedis possessio*,—which means a foothold upon land accompanied with the real and effectual enjoyment of the estate,

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with the reception of its fruits, its rents, issues, and profits, and is usually evidenced by occupation, by a substantial enclosure, by cultivation, or by appropriate use according to the particular locality and quality of the property.

To the same general effect see *Hoffman v. Woods* (40 Kas., 382).

Will it be contended that the defendants are in actual possession of the 2,300,000 acres of wild, unimproved lands involved in the case at bar, within the definition of actual possession by the Supreme Court of Oregon?

(f) *Other grounds for maintaining this suit.*

This is not a suit simply to quiet title, with an alternate prayer for enforcement of the provisions of the grants relating to the sales of the granted lands. Equity jurisprudence is invoked upon other grounds.

(g) *As a suit for injunction to prevent waste.*

It is charged in the bill of complaint that the railroad company has heretofore cut large quantities of timber growing upon the lands and has otherwise committed waste thereupon, and that it will continue to commit waste in the particulars mentioned, as well as in other respects, unless restrained. The evidence supports this allegation,

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(Ante. p. 89) and the court so found (Ante. p. 106). This presents a ground for equitabel cognizance.

Thus, it has been held that the removal of ore from public lands will be restrained by injunction. *United States v. Gear*, 3 How., 120, 133; *United States v. Parrott*, Fed. Case, 15998.

And it has been held that the United States may invoke the jurisdiction of equity to restrain the cutting of timber upon the public lands of the United States. See *Cotton v. United States*, 11 How., 228, 232; *United States v. Livestock Co.*, 76 Fed., 694; *United States v. Guglard*, 79 Fed., 21, 23.

(h) *To avoid a multiplicity of suits.*

In addition to the remedies of the United States as against the railroad company, it is necessary to secure an adjudication of the rights of the United States as against the defendant Stephen T. Gage, as surviving trustee of the trust deed of June 2, 1881; also as against the Union Trust Company, as trustee under the mortgage of July 1, 1887; also as against each of the sixty-six parties who had instituted suits against the defendants, which were pending at the time the suit at bar was instituted, and in each of which an equitable title to certain of the lands involved in the suit at bar was asserted by matter of record in the trial court. *Hale v. Allinson*, (188 U. S., 56); *DeForest et al. v. Thompson et al.*, (40 Fed., 375); *Preteca et al. v. Maxwell*

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Land Grant Co., (50 Fed., 674); Pennefeather et al. v. Baltimore etc., (58 Fed., 481); New York Life Ins. Co. v. Beard et al., (80 Fed., 66); Bailey v. Tillinghast, (99 Fed., 801); Boyd et al. v. Schneider et al., (131 Fed., 223.)

The doctrine that equity will lend its jurisdiction to render speedy and complete justice, and avoid the vexations and irreparable injuries resulting from a multiplicity of actions and suits, is peculiarly applicable to the circumstances of the suit at bar.

Even if the suit at bar was not originally cognizable in equity, the consolidation of it with the suits of the cross-complainants brought it within the jurisdiction of equity.

An objection to the jurisdiction of a court of equity may be waived by the defendants. If waived, the court will proceed to adjudicate the rights of the parties.

In *O'Hara v. Parker* (27 Oreg., 156, 173) it was expressly held that objection to the jurisdiction of equity to entertain a suit to quiet title might be waived, and in that case it was held to have been waived because the defendant failed to interpose a plea challenging the right of the plaintiff to proceed in equity, but, on the contrary, interposed an answer in which the defendant asked for affirmative relief. To the same effect see the decision in *State v. Blize*

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(37 Oreg., 404, 409); also 32 Cyc., 1338, and cases cited.

It is submitted that when the defendants moved to consolidate the suits of the cross-complainants with the suit of the Government, they necessarily conceded that the suit of the Government was cognizable in equity, and they cannot now urge objections against the jurisdiction of equity to adjudicate the cause.

VI.

WAIVER—EFFECT OF PATENTS—STATUTE OF LIMITATIONS—
LACHES.

Under which will be discussed the arguments advanced by the defendants in support of the following propositions: That all rights under the actual settlers provisions have been waived; that the provisions have been construed by executive officers adverse to the construction now advocated by the government; that the suit is barred by certain acts of Congress; that the binding force of the restrictive provisions was terminated by the issuance of patents and that the suit is barred by laches.

First. There are certain principles of law which should be kept in mind as we examine the alleged grounds of waiver.

(a) *Waiver necessarily implies knowledge of*

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the right and an intention to relinquish it.

There is a distinction between waiver on the one hand and laches and estoppel on the other. Waiver may be applicable to the Government, but laches and estoppel never. Waiver rests upon knowledge of the right and an intention to waive it. Laches rests upon neglect in the enforcement of the right.

In A. & E. Enc. of Law, vol. 29, p. 1091, it is said:

No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it.

Again,

The burden of proving knowledge is on one who relies on a waiver, and such knowledge must be plainly made to appear. Certainly a presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. * * * It has been held that a waiver never occurs unless intended. *Id.* 1093.

In *Pence v. Langdon*, 99 U. S., 578, 581, the court said:

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation

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for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed.

In *Bennecke v. Insurance Company*, 105 U. S., 355, 359, the court said:

A waiver of a stipulation in an agreement *must, to be effectual, not only be made intentionally, but with knowledge of the circumstances.* This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but *where it is sought to deduce a waiver from the conduct of the party.*

There is no proof in the case at bar that the breaches of the actual settlers provisions were ever brought to the attention of any governmental body or officer having power to waive them. An officer in the Department of the Interior known as Auditor of Railroad Accounts, and afterwards as Railroad Commissioner, received certain reports from the Oregon & California Railroad Company which showed that the company was selling the land at more than \$2.50 per acre, but not in excess of 160 acres to one person. (Ante. p. 98). These reports were transmitted to the President and by him laid before the *lower* house of Congress where they were referred to the proper committee and after-

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wards published as executive documents. This reference was, of course, merely perfunctory. There is nothing to show that Congress ever considered them or ever had any actual knowledge of what they contained. Even if it had such knowledge there is nothing to show an intention on its part to relinquish the right which the government had to have the settlers' provisions obeyed. There was but one way by which that intention, if it existed, could have been manifested; that was by resolution or an act and, of course, there was neither. Knowledge on the part of any other body or any officer of the government would have been ineffectual because, as we shall show in a moment, Congress alone had the power to waive the provision. (Infra. p. 282).

(b) *Mere silent acquiescence in breaches of a condition never constitutes waiver of either the breaches or the condition.*

In A. & E. Enc. of Law, vol. 29, p. 1105, we read:

It may be safely asserted that mere indulgence or silent acquiescence is never construed into a waiver, unless some element of estoppel can be invoked.

Again,

A waiver will not be implied from slight circumstances but must be evidenced by an un-

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equivocal and decisive act, clearly proven. Id. 1105.

In Washburn on Real Property, vol. 2, sec. 962, the rule is stated thus:

A mere silent acquiescence in, or parole assent to, an act which has constituted a breach of an express condition in a deed, would not amount to a waiver.

In Gray v. Blanchard, 8 Pick., 284, the court said:

A mere indulgence is never to be constructed into a waiver of a breach of condition; and so are the authorities.

In Trustees of Union College v. New York, 173 N. Y., 38, we find this language:

The effect of an express condition in a deed cannot be destroyed by silent acquiescence.

* * * The title to the property was vested in the grantee and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant.

In Howe v. Lowell, 171 Mass., 575, it was said:

It is to be noticed that the terms of the deed were equally well known to both parties, and whether the city was violating the condition of the deed was a matter of which the city could

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judge as well as Howe. Howe did nothing actively to induce the city to erect the pumping station. He simply stood by and saw it done without making objection.

Other authorities to the same effect: Jackson v. Cryslar, 1 Johns. Cases, 125; Carbon Block Coal Company v. Murphy, 101 Ind., 115; Tiffany on Real Property, vol. 1, p. 179.

(c) *The mere waiver of breaches of a condition will not constitute a waiver of the condition itself.*

If a party injured by one breach of a contract sees fit to waive the breach he does not thereby license the other party to made additional breaches.

In Tiedeman on Real Property, 3 ed., sec. 208, the rule is thus stated:

If a party, who is entitled to the right of entry, waives the performance by *an actual release of the condition*, or by an *express license*, the condition is gone and he cannot take advantage of any subsequent breach. *But a mere acquiescence, without actual license, would only constitute a waiver of the present breach, and the right of entry for subsequent breaches would survive.*

In Tiffany on Real Property, vol. 1, page 179, the rule is stated thus:

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The waiver operates only on previous breaches, and does not affect the right to take advantage of a subsequent breach; and, accordingly, mere silence or acquiescence in a breach of a condition will not imply a license for a subsequent breach.

In *Ireland v. Nichols* (46 N. Y., 413, 417), the court held that a condition in a lease prohibiting sub-letting is a condition of continuing obligation, and a waiver of one breach does not waive subsequent breaches; nor does it waive the condition itself.

In *Crocker v. Old South Society* (106 Mass., 489, 498), it was held that a waiver of a breach of a condition does not waive the binding force of the condition itself, nor the right to take advantage of subsequent breaches.

The practical application of the rule now being discussed is aptly illustrated by the decision in *Alexander v. Hodges* (41 Mich., 691). In that case there had been flagrant violations of the conditions of a lease by the tenant, and the lessor had exercised unusual indulgence. The tenant afterwards attempted to claim that the acquiescence of the lessor constituted a waiver of the condition itself. The court said (p. 694):

If the conditions were continuous, there is no reason to hold them waived by a receipt of

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rent for any time. The desire of the landlord to avoid coming to extremities if the lessee would mend his ways can not be regarded as a waiver, but was laudable and calculated to further the interests of both. *When there is a continuous obligation, there is nothing to prevent the exercise of forbearance until it ceases to be desirable.*

The rule discussed in the foregoing authorities is applicable in cases where the grantor has full knowledge of the breaches and full knowledge of the right of re-entry, but fails to exercise it. If in such cases there is no presumption of an intention to waive the condition and thus authorize subsequent breaches, there can be none in a case, such as the one at bar, where there is no knowledge of the breach.

(d) *No one but Congress can waive a breach of a condition, or the condition itself, in the case of a congressional grant.*

A grant, as we have seen, is a law—an Act of Congress; no one can change an Act of Congress but Congress itself. It is not in the power of any executive officer of the Government to amend, modify or waive a statutory provision. This should go without saying.

In *Hawkins v. United States*, 96 U. S. 689, 691, it is said:

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Principals * * * are, in many cases, bound by the acts and declarations of their agents, even when the act or declaration was done or made without any authority, if it appear that the act was done or the declaration was made by the agent, in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act or make the declaration for or on behalf of the public authorities.

It does not “manifestly” appear in this case that any executive officer of the Government had authority to waive the condition we are considering.

In *New York Indians v. United States*, 170 U. S., 1, it was expressly held that the executive officers of the Government had no authority to take advantage of a breach of a condition annexed to a grant made by Congress. To the same effect see: *United States v. Northern Pacific*, 177 U. S. 435.

If they had no authority to take advantage of a breach by the defendants how can it be said that failure to do so worked a waiver—that a failure to do that which they had no power to do waived a valuable right.

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Besides, on October 26, 1880, the Attorney-General advised the Executive Departments of the Government that they could not take advantage of a breach of a condition subsequent in one of the Atlantic and Pacific railroad grants, unless specifically authorized to do so by Congress. His opinion was based largely upon the decision of the Supreme Court in *Schulenberg v. Harriman*, (88 U. S., 44).

Having examined the question with great care he concluded his opinion thus:

I am therefore of opinion that the grant to the railroad has not been forfeited by its failure to complete its road within the time named in the act, no action by reason of its failure to perform the conditions having been taken by authority of Congress (16 Attorney-General's Opinions, 572, 576).

The executive officers acted on this advice. If therefore, they had knowledge of the breaches by the defendants and failed to act with respect to them, it was because they did not believe they had authority to act, and not because they intended to waive the breaches.

Second. Other grounds upon which defendants predicate waiver.

(a) *Acquiescence in the conveyance by the East*

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Side Company to the Oregon & California Railroad Company.

It is clear that the conveyances from the East Side Company to the Oregon & California Railroad Company was intended simply to make the latter company the successor of the former. The transaction was so considered and treated by all parties, including the Government. No patents were ever issued to the East Side Company, but, on the contrary, all have been applied for by, and issued to, the Oregon & California Railroad Company *as the successor of the East Side Company*. (Ante. p. 86). The chain of title runs direct from the Government to the Oregon & California Railroad Company. Moreover, the East Side Company had filed a map of location only as to the first sixty miles of the railroad, at the time it was succeeded by the Oregon & California Railroad Company. All of the other maps were filed by the latter company. That the transaction was not intended as a *sale of lands*, but as a *succession to the general franchise rights* of the older company, is too plain to require argument.

(b) *Construction of act by executive officers.*

It is contended by the defendants that the Commissioner of the General Land Office, the Auditor of Railroad Accounts, afterwards called Railroad Commissioner, and other officials of the Government, many years ago put a construction upon the grants to the effect that the actual settlers provision was inapplicable. This is predicated largely upon

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the claim that the Auditor of Railroad Accounts was required by the act of June 19, 1878, creating his office, to see that the laws with respect to land grant railroads west of the Missouri River were enforced; that he knew the grantee railroad company had repeatedly violated the terms of the actual settlers provision and that he took no steps to enforce the law against it. This they affect to believe amounted to a construction by him of the law and that such construction is binding upon the Government under the rule that

When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution, where that construction has for many years, controlled the conduct of the public business. (U. S. v. Healey, 160 U. S., 141).

A ready answer to this contention is that the Auditor of Railroad Accounts was charged with the duty of enforcing the law, not with power to waive its enforcement. Furthermore, the fact that an officer charged with the duty of enforcing a law, fails to perform that duty, cannot be plead as a defense by the law violator when he is called to account for his dereliction. Besides, neither the Auditor of Railroad Accounts, nor any other executive officer of the Government, had the power to en-

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force the actual settlers provision. That, as we have seen, could be done only by Congress declaring a forfeiture, or specifically authorizing some officer to do so. Congress had not done this prior to 1908 and, hence, the Auditor of Railroad Accounts and all other executive officers were without power in the premises.

Moreover, the decisions cited by defendants in no wise warrants the position which they take. They are cases which deal with situations where an executive officer was authorized by Congress to administer a law which is open to more than one construction. In such cases the construction adopted by the officers is given much weight by the courts. In *Webster v. Luther*, (163 U. S., 331, 342), we read:

The practical construction given to an Act of Congress, fairly susceptible of different construction, by one of the executive departments of the Government, is always entitled to the highest respect and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted, * * * but this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.

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The question here, as presented by the defendants, is not whether one meaning or another shall be given to the actual settlers provision, but whether it shall be given an meaning at all—whether it shall not be rejected as so much surplusage.

But there is another consideration in this connection which is most significant. The construction which defendants say was placed upon this act by the executive officers of the Government is at best a strained deduction from *failure* to act. How particularly unsubstantial must such a deduction be in the presence of the fact that the Secretary of the Interior affirmatively construed the actual settlers provision, at the request of Mr. Holladay, President of the grantee railroad company, and held that it was enforceable and meant precisely what it said. This was done, it will be remembered, in 1871 (Ante. p. 66 *et seq.*). That construction has never been changed. It is precisely the same as the construction for which the Government now contends. In addition, the executive officers in 1880 were advised by the Attorney-General that they had no power to declare a forfeiture in the case of violated railroad grants, without the specific authority of Congress. (Ante. p. 284). Whatever the Auditor of Railroad Accounts, or other executive officer, failed to do with respect to the enforcement of the actual settlers provision must be construed in the

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light of these opinions, and when so considered the deduction tortured from the failure must vanish into thin air.

(c) *By the general forfeiture act of September 29, 1890. The first section of this act provided:*

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to, and coterminous with, the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted.

The sole purpose of this act was to declare a forfeiture for breach of conditions of the grants requiring construction of the railroad.

The act was general, applying to all grants, and *can not be held to have been intended to apply to conditions peculiar to some of the grants and not common to all.* Moreover, it can not be presumed that Congress had in mind breaches of conditions other than those relating to the construction of the railroad.

Even if the presumption contended for by defendants should be indulged, at the most it could be claimed as a waiver of breaches which occurred

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prior to September 29, 1890. It would not be a waiver of breaches occurring thereafter, and, as the bill of complaint sets forth, nearly all of the substantial breaches in the case at bar occurred after that time.

(d) *The act of January 31, 1885.*

It is also contended by defendants that the forfeiture act of January 31, 1885, relating to the West Side grant, by implication waived the binding force of the condition restricting the manner of selling the granted lands.

This is so unreasonable that discussion is unnecessary.

(e) *Constructive notice ineffectual.*

Waiver, as we have seen, implies actual knowledge; it will never be presumed from constructive knowledge alone.

Besides a party is never held to have constructive knowledge of instruments recorded subsequent to his own title.

In A. & E. Enc. of Law, vol. 24, page 146, it is said:

The operation of the record as notice is prospective and not retrospective. It is only a subsequent conveyance which defeats a prior unrecorded conveyance, and therefore, only

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persons who acquired their rights subsequently to the registration can be said to be charged with notice of a recorded conveyance.

In *Rannels v. Rowe*, 145 Fed., 296, it was held that a party is not bound by constructive knowledge of instruments recorded subsequent to his title.

It is submitted that there is nothing in the case at bar justifying the conclusion that the actual settlers provision was waived.

Third. Do the acts of March 3, 1891, and of March 2, 1896, bar the suit?

The act of March 3, 1891, provides:

That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

The act of March 2, 1896, provides:

That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the

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date of the issuance of such patents, and the limitation of section 8 of chapter 561 of the acts of the second session of the 51st Congress, and amendments thereto, is extended accordingly as to the patents herein referred to.

These provisions, by their terms, relate to suits brought to annul patents. This is not a suit of that kind. While the patent may be annulled as the result of it, it is not predicated upon the idea that the patent was improperly issued, but upon the ground that a condition of the grant has been breached. The title was conveyed by the grant, not by the patent. The latter is but evidence of the title. It was manifestly the intention of Congress in passing the above mentioned acts to give the Government six years in the one case, and five in the other, *after* the cause of action had *arisen*, in which to bring suit. In truth the statute of limitations necessarily implies the existence of a cause of action, which is to be barred after the lapse of a certain time. Lands under railroad grants are not subject to disposition until patents have been issued. *St. Paul etc. v. Northern Pacific*, 139 U. S., 1; *Deseret Salt Company v. Tarpey*, 142 U. S., 241. It follows that a breach of the condition subsequent could not take place until after the patent had been issued. This in itself shows the inapplicability of the statutes in question.

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Suppose in this case no breach had taken place until seven or eight years after the patents had been issued, would it be reasonable to say that the cause of action was barred by those statutes—barred before it arose? To give such an effect to the statutes would be to treat them, not as statutes of limitations, but as suits amending the granting acts so as to eliminate the provision imposing the condition subsequent.

In 25 Cyc. 990, we read:

It is a familiar principle that a statute of limitation should not be applied to cases not clearly within its provisions. Even cases within the reason, but not within the words, of a statute are not barred but may be considered as omitted cases which the legislature did not deem proper to limit.

See also: *Kirkman v. Hamilton*, 31 U. S., 20, 23; *Missouri etc. v. Rice*, 84 Fed., 131; *Baker, v. Kelley*, 11 Minn., 480; *Henry v. Mining Co.*, 1 Nev. 619.

If Congress had intended to eliminate the actual settlers provision from the grant, it would have done so openly, and not under the guise of a statute of limitations.

Obviously this is not a suit to annul the patents. If it were it would be useless, because the title to

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these lands would still remain in the defendants. To make this suit effective it must go beyond the patents and deal with the grant, which is the source of defendants' title. It is a suit to annul the grant, not the patent, except as an incident. Therefore, these statutes do not apply.

Fourth. Did the issuance of patents bar the suit?

(a) *What does a patent import?*

All acts of Congress conferring authority upon the Interior Department to issue patents for the public lands prescribed that the patents shall be issued only upon compliance by the claimant with certain requirements. Therefore, before the Interior Department issues a patent for any of the public lands, it is the duty of the Interior Department to ascertain whether the provisions of the law have been complied with so as to entitle the party to a patent. Congress having conferred this authority upon the Department of the Interior, the issuance of a patent by the Interior Department, in the absence of fraud or mistake, is ordinarily conclusive as to the existence of the facts justifying the issuance of the patent. And in this sense, patents are said to be conclusive. But this is the extent of the rule, and the reason for the rule.

Patents issued by the Interior Department never convey any greater estate than that authorized by the law under which they are issued. Patents are

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always to be construed as subordinate to all laws relating to the subject in force at the time. The quality of the estate conveyed by the United States can not be ascertained by reference to the terms of the patent alone; but it must be determined by reference to the laws of Congress upon the subject. To illustrate: Patents issued under the homestead law convey a title which cannot be subjected to the payment of debts contracted prior to the date of the patent. This qualification of the estate is not set forth in the patent itself, and yet the effect of the patent is qualified by this provision of the law.

The decision in *Hough v. Porter* (51 Oreg. 388) (98 Pacific Reporter, 1083), is instructive upon this question. The authorities are there collected and discussed, and the court held that in order to determine the nature or quality of the estate conveyed by a government patent, reference must be had to all acts of Congress in force at the time; and that patentees take title with notice of all of the qualifications annexed to the title by virtue of existing laws.

So, it has been held that patents issued under the homestead or preemption laws are subject to the general laws of the United States granting right of way to railroads, through the public lands, although no reference is made in the patent itself to this qualification. (See *Railroad Company v. Baldwin*, 103 U. S., 426).

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But where Congress makes a grant direct, as in the case of railroad grants, and provides for the issuance of patents after the identity of the lands has been ascertained, and as rapidly as the lands are earned, the patent serves an entirely different function. It does not *create the estate or title*; much less does it *define the terms and conditions of the estate or title*. In such a case, the patent performs two distinct functions, viz:

First. It identifies the land, which was not identified by the grant; and it certifies that the lands have been earned by performance of the conditions of the grant precedent to the issuance of the patent.

Second. It fixes the time when the lands are subject to disposition by the grantee; the lands not being subject to disposition prior to the issuance of patent.

The grants in the case at bar illustrated the function and effect of patents under railroad grants. The granting acts *created* the title or estate, and *constituted the grant*. The terms and conditions of the grant—the nature and quality of the estate or title granted—are determined by the granting acts. If the identity of the lands had been known at the time the granting acts were enacted, and Congress had intended to permit the railroad company to immediately dispose of all the lands, there would have been no necessity for the issuance of patents.

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(b) *Authority of the Interior Department as to the issuance of patents under railroad grants.*

In the issuance of patents under railroad grants, the authority and duty of the Interior Department were limited and specific. The Interior Department had but three questions to determine, viz., (1) whether the railroad was constructed as prescribed by the granting act; (2) whether the lands claimed were of the general character described in the granting act, i. e., that they were odd-numbered sections within the limits of the grant; (3) whether the lands claimed were excluded by any of the exceptions of the grant, i. e., that they had not been theretofore disposed of by the United States, and were not subject to homestead or preemption claim, and were not mineral in character.

This being the extent of the duty of the Interior Department in the premises, it necessarily follows that patents issued pursuant to that duty had no greater effect than that of establishing the existence of the facts which made it the duty of the Interior Department to issue the patents.

In support of the foregoing statement of the general functions and effect of patents issued under railroad grants, see the following authorities: *Wisconsin R. R. Co. v. Price Co.*, 133 U. S., 496, 510; *St. Paul etc. v. Northern Pacific*, 139 U. S.,

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1, 6; *Desert Salt Company v. Tarpey*, 142 U. S., 241, 251.

In support of the general proposition that where lands are granted by act of Congress the patents issued thereunder do not add anything to the quality or nature of the estate of the grantee, see the following authorities: *Ryan v. Carter*, 93 U. S., 78, 82; *Morrow v. Whitney*, 95 U. S., 551, 555; *Whitney v. Morrow*, 112 U. S., 693, 695; *Wright v. Roseberry*, 121 U. S., 488, 499.

It is contended on behalf of the defendants that the issuance of patents by the Interior Department was an adjudication, binding upon the United States, that there had been no breach of any of the conditions annexed to the grant. There is no foundation for this contention, either in principle or authority. The Interior Department had no authority to inquire into the question whether the conditions of the grant had been complied with, except those conditions which were made precedent to the issuance of the patent. To illustrate: Nearly all of the land grant railroads failed to construct railroads within the time prescribed by Congress. Applications were made for patents after the railroad company was in default. The question arose whether the Interior Department was in duty bound to issue patents under such circumstances. It was held by the Attorney-General (16 Attorney-Gen-

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eral's Opinions, 397, 401) that the executive officers of the Government had no authority to refuse to issue patents because of a breach of the conditions annexed to the grant; that the authority to take advantage of a breach of condition rested solely with Congress; and that, until Congress authorized a claim of forfeiture for breach of a condition, the executive officers of the Government must continue to issue patents. And this was expressly held by the Supreme Court in *New York Indians v. United State*, 170 U. S., 1.

In other words, even if the Interior Department had known that the railroad company in the case at bar had violated the conditions of the grant restricting the manner of selling the lands, it would still have been the official duty of the Secretary of the Interior to issue patents, if the railroad company was otherwise entitled to them. This being true, it is absurd to contend that the issuance of patents was an adjudication that there had been no breaches of the conditions of the grants restricting the selling of the granted lands.

(c) *One of the functions of patents under railroad grants was to fix the time when lands were subject to disposition.*

A consideration of the second general function of patents issued under railroad grants, above referred to, is conclusive upon the general question.

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Until patents were issued, none of the lands were subject to sale by the railroad company upon any terms, or in any manner. This was expressly held in *St. Paul etc. v. Northern Pacific*, 139 U. S., 1; and *Deseret Salt Company v. Tarpey*, 142 U. S., 241.

Upon the issuance of patents the lands in question were subject to disposition by the railroad company and not before. It is submitted that the issuance of the patents for the granted lands affected in no manner the binding force of the conditions embraced in the actual settlers provision.

Fifth. It is, in effect, contended that the doctrines of laches and estoppel are applicable to the United States, and bar the institution of the present suit.

Several of the arguments advocated by counsel for defendants, while disclaiming any intention to invoke the doctrines of laches and estoppel, nevertheless, when reduced to their final analysis, amount to that and nothing more. That neither of these doctrines may be invoked as against the Government, is too familiar to require discussion. Reference is made to the following authorities: *A. & E. Enc. of Law*, vol. 29, page 156, and cases cited; *United States v. Kirkpatrick*, 9 Wheat., 720, 735; *United States v. Van Zant*, 11 Wheat., 184; *Dox v. Postmaster-General*, 1 Pet. 318, 325; *Gibbons v. United States*, 8 Wall. 269, 275; *Gibson v. Chouteau*, 13 Wall., 92, 94; *Hart v. United States*, 95

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U. S., 316; *Gaussen v. United States*, 97 U. S., 584; *United States v. Dalles Military Road Co.*, 140 U. S., 599, 632; *United States v. Beebe*, 180 U. S., 343, 354; *United States v. Michigan*, 190 U. S., 379, 405; *State v. Portland General Electric*, 95 Pac., 722.

Attention is directed particularly to the decision of the Supreme Court in *United States v. Dalles Military Road Company*, 140 U. S., 599, 632, where it was held that a resolution of Congress, directing the institution of judicial proceedings, is conclusive that there has been no laches on the part of the Government. The court said (page 632):

An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defense, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defenses of stale claim and laches can not be set up against the Government.

The foregoing doctrine is applicable to the case at bar. And the same principle applies also to the claim of waiver. How ridiculous it would be for the court to hold that Congress had deliberately directed the institution of the present suit, and the assertion of the right of forfeiture on behalf of the United States, when Congress had, by its own conduct,

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waived the enforcement of this right of forfeiture, and had been guilty of laches in respect thereto.

VII.

RIGHTS OF THE UNION TRUST COMPANY AND STEPHEN
T. GAGE.

The terms of the grants were matters of public record. The repeated sales of the lands in violation of those terms were also matters of public record. When the deeds of trust represented by Stephen T. Gage and Union Trust Company were issued, the grantees therein were charged with knowledge of the terms of the grant and the violations thereof, consequently their titles came to them afflicted with the same infirmities as those possessed by the title of their grantor, the Oregon & California Railroad Company. And their rights must now stand or fall in accordance with the outcome of the suit with respect to that title.

Moreover, it will be remembered that Mr. Gage holds his deed as security for the preferred stock of the Oregon and California Railroad Company. This stock, as well as all the common stock of that company is owned by the Southern Pacific Company. For upwards of twenty years the latter company has been the master of the Oregon and California Railroad Company; has directed all its acts, whether good or bad; has, in truth, been and is the Oregon

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and California Company. Therefore, it would be unreasonable to hold that the Oregon and California Railroad Company had forfeited all its title to those lands, but that the Southern Pacific Company could enforce, through the trustee, Mr. Gage, its claim against them. To do so would be to sacrifice substance to form, to follow the letter which kills, and reject the spirit which quickens.

Moreover, the evidence shows without contradiction that the property, outside of the granted lands, covered by the Union Trust Company's mortgage, is worth upwards of \$30,000,000 (*Ante*, p. 97). The balance due on the mortgage is less than \$17,745,000.00, so that if under some possible view the Trust Company's mortgages should be held valid, the company would be compelled under the rule of marshaling assets to exhaust the property which is not claimed by the Government before having recourse to that which is. (*Matthews v. Memphis, etc., Railroad Company*, 108 U. S. 756, 757.)

CONCLUSION.

The terms of the actual settlers provisions of the acts of 1869 and 1870 are as plain as language could make them. There cannot be and never could have been any just reason for misunderstanding them. More than forty years ago the Oregon and California Railroad Company sought and obtained from the Secretary of the Interior an interpretation of those provisions which is in complete harmony with the interpretation now urged by the Government. From that interpretation no officer of the Government has ever deviated. Notwithstanding this, the defendant Railroad Company flagrantly violated those provisions and now seem to think it harsh that the consequences of its misconduct should be visited upon it. There is not a single equity in its favor; for every dollar in taxes paid it has received more than \$3.00 out of the lands; for every dollar in value given to the Government in the form of free transportation it has received about \$6.00 from the proceeds of the lands (*Ante*, p. 89); for upwards of a quarter of a century it has, for its own selfish purposes and in contempt of the laws of the country, withheld these lands from home seekers, has thwarted the industrial development of a large section of a great state and now demands the right to continue in its vicious work of obstruction and

CONCLUSION.

law defiance. Unless it be reprehensible for the Government to enforce its laws—and there are some who seem to think it is—there is no room for the claim that its action in demanding a forfeiture of the lands in question is inequitable and should be condemned. The decree of the lower court is right and we ask that it be affirmed.

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United States Attorney for Oregon.

Constantine J. Smyth,

Fred C. Rabb,

Special Assistants to the Attorney-General.

APPENDIX A.

Acts providing for sale of lands at public auction and the dates thereof:

- 1 Stat., 464, May 18, 1796.
- 2 Stat., 229, March 3, 1803.
- 2 Stat., 277, March 26, 1804.
- 2 Stat., 448, March 3, 1807.

Acts providing for the protection of actual settlers and the dates thereof:

- 1 Stat., 257, April 21, 1792.
- 1 Stat., 442, March 3, 1795.
- 2 Stat., 229, March 3, 1803.
- 2 Stat., 455, January 19, 1808.
- 4 Stat., 420, May 29, 1830.
- 4 Stat., 603, July 14, 1832.
- 4 Stat., 663, March 2, 1833.
- 4 Stat., 678, June 19, 1834.
- 4 Stat., 743, June 30, 1834.
- 5 Stat., 251, June 22, 1838.
- 5 Stat., 382, June 1, 1840.

Other acts for the benefits of settlers and the dates thereof:

- 5 Stat., 453, September 4, 1841.
- 10 Stat., 574, August 4, 1854.
- 12 Stat., 392, May 20, 1862.

APPENDIX A.

Acts making grants to aid in the construction of canals and the dates thereof:

- 4 Stat., 236, March 2, 1827.
- 4 Stat., 234, March 2, 1827.
- 4 Stat., 305, May 24, 1828.
- 5 Stat., 245, June 18, 1838.
- 10 Stat., 35, August 26, 1852.
- 13 Stat., 519, March 3, 1865.
- 14 Stat., 30, April 10, 1866.
- 14 Stat., 80, July 3, 1866.

Acts making grants to aid in river improvements and the dates thereof.

- 4 Stat., 290, May 23, 1828.
- 9 Stat., 83, August 8, 1846.
- 9 Stat., 77, August 8, 1846.

Acts making grants to aid in the construction of wagon roads and the dates thereof:

- 3 Stat., 727, February 28, 1823.
- 4 Stat., 234, March 2, 1827.
- 4 Stat., 242, March 3, 1827.
- 12 Stat., 797, March 3, 1863.
- 13 Stat., 140, June 20, 1864.
- 13 Stat., 183, June 25, 1864.
- 13 Stat., 355, July 2, 1864.
- 14 Stat., 86, July 4, 1866.
- 14 Stat., 89, July 5, 1866.

APPENDIX A.

14 Stat., 409, February 25, 1867.

15 Stat., 340, March 3, 1869.

Acts making grants in favor of railroads and the dates thereof:

9 Stat., 466, September 20, 1850.

10 Stat., 8, June 10, 1852.

10 Stat., 155, February 9, 1853.

10 Stat., 302, June 29, 1854.

11 Stat., 9, May 15, 1856.

11 Stat., 15, May 17, 1856.

11 Stat., 17, June 3, 1856.

11 Stat., 18, June 3, 1856.

11 Stat., 20, June 3, 1856.

11 Stat., 21, June 3, 1856.

11 Stat., 30, August 11, 1856.

11 Stat., 195, March 3, 1857.

12 Stat., 489, July 1, 1862.

12 Stat., 772, March 3, 1863.

13 Stat., 64, May 5, 1864.

13 Stat., 66, May 5, 1864.

13 Stat., 72, May 12, 1864.

13 Stat., 365, July 2, 1864.

14 Stat., 83, July 4, 1866.

14 Stat., 87, July 4, 1866.

14 Stat., 94, July 13, 1866.

14 Stat., 210, July 23, 1866.

14 Stat., 236, July 25, 1866.

14 Stat., 239, July 25, 1866.

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- 14 Stat., 292, July 27, 1866.
 - 14 Stat., 548, March 2, 1867.
 - 16 Stat., 94, May 4, 1870.
 - 16 Stat., 573, March 3, 1871.
- .

APPENDIX B.

General forfeiture acts referred to on page —:

- 16 Stat., 277, July 14, 1870.
- 18 Stat., 29, April 15, 1874.
- 18 Stat., 72, June 15, 1874.
- 19 Stat., 101, July 24, 1876.
- 19 Stat., 404, March 3, 1877.
- 23 Stat., 61, June 28, 1884.
- 23 Stat., 296, January 31, 1885.
- 23 Stat., 337, February 28, 1885.
- 24 Stat., 123, July 6, 1886.
- 24 Stat., 140, July 10, 1886.

APPENDIX C.

Authorities as to words necessary to constitute a condition subsequent without words of re-entry or forfeiture:

Marston v. Marston, 47 Me. 495; Chapman v. Pingree, 67 Me. 198; Rawson v. Uxbridge, 7 Allen 125; Gray v. Blanchard, 8 Pick. 284, 287; Hayden v. Stoughton, 5 Pick. 528; Tilden v. Tilden, 13 Gray 103; Langley v. Chapin, 134 Mass. 82; Howe v. Lowell, 171 Mass. 575; Clapp v. Wilder, 176 Mass. 332, 335; Brown v. Caldwell, 23 W. Va., 187, 190; Countryman v. Deck, 13 Abbott's New Cases, N. Y., 110; Trustees of Union College v. New York, 173 N. Y. 38; Hammond v. R. R. Co., 15 S. C. 10, 32; Woodruff v. Trenton Water Power Co., 10 N. J. Eq. 489; Downer v. Downer, 9 Watts 60; Hoyt v. Ketcham, 54 Conn. 60; Pierce v. Brown University, 21 R. I. 392; Blanchard v. Detroit, etc., R. Co., 31 Mich 43, 50; Warvelle on Vendors, 2 Ed., Vol. 1, Sec. 445; Brewster on Conveyances, Ccc. 177.

APPENDIX D.

WITNESSES FOR DEFENDANTS.

Legend.

- “A” Name of witness called, his occupation and page of record where his testimony appears.
“B” County wherein land testified about is located.
“C” Area within county covered by testimony of witness.
“D” Condition of land in natural state.
“E” Percentage of lands suitable for tillage after they have been cleared.
“F” Granted lands in present condition suitable for settlement in tracts of a quarter section.

Symbols.

Employees—Employees of Southern Pacific Company or Oregon and California Railroad Company.

Ex-Employees—Former employees of Southern Pacific Company or Oregon and California Railroad Company.

A—Agricultural lands, suitable for tillage.

G.—Grazing lands.

N. G.—Worthless land.

°—Part.

?—Uncertain.

"A"	"B"	"C"	"D"	"E"	"F"
EMPLOYEES. L. D. McLeod Timber Cruiser (R. VI-2832)	Clackamas Marion Polk Lane Douglas Coos Curry Josephine Jackson Columbia Yamhill Lane Douglas Part of all	? ? ? ? ? ? ? ? ? ? 2 Twp. 1 Twp. 1 Twp. 7 Twp. ?			None None None None None None None None 5% 5% 5% 5%
Alick Wilkinson Timber Cruiser (R. VI-3897)			Timber A. 5% Timber A. 5% Timber A. 5% Timber A. 5% Ex. 353		
A. W. Reese Timber Cruiser (R. VI-2825)					

"A"	"B"	"C"	"D"	"E"	"F"
S. C. Bruce Timber Cruiser (R. VI-2825)	Ex. 343				Doubtful as to grazing lands
D. C. McLennan Timber Cruiser (R. VI-2858)	Ex. 351				
W. J. Lander Timber Cruiser (R. VI-2845)	Ex. 350				
Willis Vidito Fire Warden (R. VI-3058)	Benton	All	Timber	A. Some	None
B. A. McAllaster Land Com'r (R. IV-1938)					(See Note 1)
J. B. Eddy Tax Agent (R. V-2552)	?	?			

"A"	"B"	"C"	"D"	"E"	"F"
EX-EMPLOYEES.					
Chas. W. Eberlein	Multnomah	?			None (Note 2)
Ex-Land Agent	Clackamas	?			None
(R. V-2228)	Klamath	?			None
David Loring	?	?			(See Note 3)
Ex-Chief Clerk					
(R. V-2187)					
F. A. Elliott	All except	All	Timber	A. 10%	None
Ex-Tmbr Cruiser	Curry,				(Note 4)
(R. VI-2714)	Douglas,		40%—N. G.		
(Deft. Ex. 355)	Jackson		40%—N. G.		
J. D. Zureher	Douglas	All	Timber	A. 20%	None
Ex-Tmbr Cruiser			A. 1-10%		
(R. VI-2994)					
Roy Woods	Columbia	Some			None
Ex-Tmbr Cruiser	Douglas	Little			None
(R. VI-2870)	Coos	Some			None
	Josephine	Some			
J. T. Gray	Benton	1/2			None
Ex-Fire Warden			3/4 timber	A. 15%	
(R. VI-3119)					

"A"	"B"	"C"	"D"	"E"	"F"
Homer D. Angell Ex-Land Exam. Attorney (R. VI-2764)	Clackamas Polk Marion Multnomah Linn Lane Douglas Josephine Jackson	? ? ? ? ? ? ? ? ?	Timber° Timber° Timber° Timber° Timber° Timber° Timber° Timber° Timber°		None None None None None None None None None
Ben Irwin Ex-Land Exam. (R. VI-2899)	Part of all	?	Timber	Part—N. G.	None
OTHERS.					
A. C. Dixon Lumberman (R. V-2637)	Uncertain		Timber A. 20%	Pasture and farming	
H. W. Scott Farmer-Timber (R. VI-2972)	Washington	4 Twp.	Timber	A. 20%	None

"A"	"B"	"C"	"D"	"E"	"F"
J. F. Nelson Farmer (R. VI-2972)	Clackamas	All	Timber ^o	A. 4%	None
Fred A. Kribs Timberman (R. VI-2909)	Clackamas	?	Timber		None (Note 5)
R. L. Booth Farmer (R. VI-3138)	Yamhill	4 Twp.	Timber ^o	A. 25% G. All	
H. W. Scott Farmer-Timber (R. VI-2972)	Yamhill	4 Twp.	Timber	A. 20%	None
George W. Jones Timberman Official (R. VI-2989)	Yamhill	2 Twp.	Timber	G.	None
W. A. Ball Assessor (R. VI-3228)	Lincoln	All	A. 2000 acres		Some

"A"	"B"	"C"	"D"	"E"	"F"
W. V. Fuller Timber Cruiser Merchant (R. VI-3127)	Polk	5 Twp.	Timber	A. 30%	None
Fred A. Kribs Timberman (R. VI-2909)	Polk	?	Timber		None (Note 5)
H. W. Scott Farmer-Timber (R. VI-2972)	Polk	5 Twp.	Timber	A. 20%	None
H. W. Scott Farmer-Timber (R. VI-2972)	Tillamook	All	Timber	A. 10%	None
Fred A. Kribs Timberman (R. VI-2909)	Multnomah	?	Timber		None (Note 5)
C. H. Stewart Ex-Merchant (R. VI-3007)	Linn	10 Twp.	Timber	A. 50%	Similar lands set- tled

"A"	"B"	"C"	"D"	"E"	"F"
R. A. Booth Lumberman (R. V-2577)	Linn	Part	Timber		
Fred A. Kribs Timberman (R. VI-2909)	Linn	3 Twp.	Timber		None (Note 5)
Fred A. Kribs Timberman (R. VI-2909)	Lane	Part	Timber		None (Note 5)
R. B. Hunt Surveyor (R. VI-3138)	Lane	All	Timber	A. 20% G. 60%	None
R. A. Booth Lumberman (R. V-2577)	Lane	All	Timber	Pasture and farming	If settler would dis- pose of timber
Milford Jacobs Timber Cruiser (R. VI-3178)	Douglas	5 Twp.	Timber ^o	A. 60%	Some

"A"	"B"	"C"	"D"	"E"	"F"
C. M. Stites Timber Cruiser Farmer (R. VI-2878)	Douglas	2 Twp.			None
Irvine Gardner Timber Cruiser (R. VI-3025)	Douglas	31 Twp.	Timber— 95% A. 1%	A. 30%	None (Note 6)
R. A. Booth Lumberman (R. V-2577)	Douglas	Some	Timber		
Fred A. Kribs Timberman (R. VI-2909)	Douglas	10 Twp.	Timber		None (Note 5)
Fred A. Kribs Timberman (R. VI-2909)	Coos	16 Twp.	Timber		None (Note 5)
Milford Jacobs Timber Cruiser (R. VI-3178)	Coos	3 Twp.	Timber	A. 60%	

"A"	"B"	"C"	"D"	"E"	"F"
Dennis McCarthy Timber Cruiser (R. VI-3068)	Coos	All	Timber	A. 5% G. 60%	None
Dennis McCarthy Timber Cruiser (R. VI-3068)	Curry	All	Timber ^o		None
Fred A. Kribs Timberman (R. VI-2909)	Curry	1 Twp.	Timber		None (Note 5)
Fred A. Kribs Timberman (R. VI-2909)	Josephine	?	Timber		None
C. M. Stites Farmer-Timber (R. VI-2878)	Josephine	All	Timber ^o A. 2%		None
W. H. Fallin Dep. Assessor (R. VI-3015)	Josephine	All	A. 5% Timber ^o Barren ^o		

"A"	"B"	"C"	"D"	"E"	"F"
W. R. Whipple Surveyor (R. VI-2934)	Josephine	All	N. G. 85% Timber— 15%		None
Elmer S. Shank Real Estate Lawyer	Josephine	All	Timber— 15%	A. 5%	21½%
R. A. Booth Lumberman (R. V-2577)	Josephine	Part	Timber		
J. F. Kimball Timberman (R. VI-3164)	Jackson	4 Twp.	Timber		Some
C. M. Stites Farmer-Timber (R. VI-2878)	Jackson	6 Twp.	Timber		None
Fred A. Kribs Timberman (R. VI-2909)	Jackson	?			(Note 5)

"A"	"B"	"C"	"D"	"E"	"F"
W. T. Grieve Assessor (R. VI-3199)	Jackson	All	Timber ^o	A. 12%	None (See Note 7)
Milford Jacobs Timber Cruiser (R. VI-2969)	Klamath	3 Twp.	Timber ^o	A. 2%	Some
J. F. Kimball Timberman (R. VI-3164)	Klamath	8 Twp.	Timber		None

OTHER MATTERS TESTIFIED TO BY ABOVE WITNESSES.

1. Value of timber from \$1.00 to \$2.50 per thousand feet board measure.
2. Quantity of timber on quarter section from 3,000,000 to 25,000,000.
3. Cost of clearing land for tillage from \$50.00 to \$500.00 per acre.
4. Lands acquired under homesteads in timber area generally abandoned and lands passed to timber companies.
5. If these granted lands had been sold under the terms of the act of April 10, 1869, and act of May 4, 1870, title would have passed to timber companies.

NOTES.

- (1) B. A. McAllaster had no personal knowledge of character of lands (McAllaster, R. IV-2015) ; exhibits attempted to be identified by this witness relating to this subject all under objection.
- (2) Charles W. Eberlein had but slight personal knowledge of the character of any of the granted lands (Eberlein, R. V-2383). His report of May 1, 1908 (Deft. Ex. 309, R. XIII-702), based upon hearsay.
- (3) David Loring in statement to Government representative (Govt. Ex. 116, R. XI-5509), estimated lands suitable for agricultural and horticultural purposes in Douglas, Josephine and Jackson counties at from 60% to 75% of the unsold granted lands.
- (4) F. A. Elliott, in a statement to counsel for Government (Govt. Ex. 122, R. VI-2742), estimated that 50% of the unsold granted lands would be chiefly valuable for growing food stuffs and other farm products.
- (5) Fred A. Kribs attempted to cover, by his testimony, all of the unsold granted lands, but his personal knowledge is shown to be confined to the lands set forth above (Kribs, R. VI-2921, *et seq.*)
- (6) Irvine Gardner, a homesteader within the area of the unsold granted lands, in an affidavit made before a Government officer (Govt. Ex. 117), estimated unsold granted lands suitable for agriculture at one-third and those suited for grazing at two-thirds.

(7) W. T. Grieve, in an affidavit made before an officer (Govt. Ex. 120, R. XI-5526), stated that from 15% to 50% of the quarter sections of unsold granted lands in Jackson County were suitable for settlement. The variation owing to the locality.

APPENDIX E.

WITNESSES FOR GOVERNMENT.

Legend.

- “A” Name of witness called, his occupation, and page of record where his testimony appears.
- “B” County wherein land testified about is located.
- “C” Area within the county covered by testimony of witness.
- “D” Condition of land in natural state.
- “E” Percentage of lands suitable to tillage after they have been cleared.
- “F” Granted lands in present condition suitable to settlement in tracts of a quarter section.

Symbols.

A—Agricultural lands, suitable for tillage.

G—Grazing lands, in addition to agricultural lands.

°—Part.

"A"	"B"	"C"	"D"	"E"	"F"
J. H. Turner Farmer (R. VII-3554)	Clackamas	1 Twp.		A. All	All
John Zeek Ex-Farmer (R. VII-3538)	Clackamas	1 Twp.		Large part tillable	All
W. H. Kandle Farmer (R. VII-3551)	Clackamas	2 Twp.	Timber— Burn	A. 50%	
A. W. Riggs Farmer (R. VII-3560)	Clackamas	1 Twp.	Burn	A. 75%	
C. L. Standing Farmer (R. VII-3465)	Clackamas	4 Twp.		A. 25% up	All

"A"	"B"	"C"	"D"	"E"	"F"
U. S. Dix Farmer (R. VII-3508)	Clackamas	2 Twp.			All
E. E. Quick Ex-Farmer Abstracter (R. VII-3477)	Columbia	All	Timber	A. 70% to 80%	All
Andrew Anderson Farmer (R. VIII-3860)	Columbia	2 Twp.	Timber°	A. 50%	All
T. W. Grant Farmer (R. VIII-3866)	Columbia	1 Twp.		A. 45%— G. 50%	All
D. MacLafferty Cross-Comp. (R. VIII-3908)	Columbia	1 Twp.	Timber	A. 60% to 70%	All
N. H. Martin Ex-Farmer Timber Cruiser (R. VII-3300)	Marion	1 Twp.	Timber	25% of 160 acres	All

"A"	"B"	"B"	"D"	"E"	"F"
C. W. Mariels Stock (R. VIII-3836)	Marion	1 Twp. 2 Twp.		A. 50% A. 40% to 75%	Part All
F. M. Wilkes Ex-Farmer Co. Surveyor (R. VIII-3824)	Benton	4 Twp.	Timber°	A. 50% to 60%	All
R. G. Balderee Cross-Comp. (R. VIII-3833)	Benton	1 Twp.	Timber	A. 65%	All
S. N. Warfield Ex-Farmer Co. Recorder (R. VIII-4152)	Benton	4 Twp.	Little timber	Agricultural	Practically all even sections settled
R. G. Balderee Cross-Comp. (R. VIII-3833)	Polk	1 Twp.	Timber	A. 50%	All
Thos. B. Masters Timberman (R. VIII-4002)	Polk	5 Twp.	Timber— Burn	A. 75%	All

"A"	"B"	"C"	"D"	"E"	"F"
J. N. Switzer Ex-Farmer (R. VIII-4011)	Yamhill	2 Twp.	Timber°	A. 40% to 50%	All
F. J. Steward Farmer (R. VIII-4027)	Yamhill	3 Twp.	Burn	A. 35% to 40%	All
H. S. Maloney Co. Treasurer (R. VIII-4037)	Yamhill	1 Twp.	Tim.-Burn	A. 40% to 50%	Stock
(Affidavit offered to show surprise, stating 90% of 1/4 sections would be taken by settlers)		1 Twp.	Tim.-Burn	Grazing	Every even
		1 Twp.	Tim.-Burn	A. Part	section
				G. Part	taken by settlers
Wm. Brenner Farmer (R. VII-3636)	Linn	4 Twp.	Timber— Burn	A. 90%	No opinion
O. M. Carlson Farmer (R. VII-3758)	Linn	1 Twp.	Timber°	A. 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
C. W. Mariels Stock (R. VIII-3836)	Linn	2 Twp.		A. 50%	All
Jas. F. Wilson Farmer (R. VIII-3934)	Linn	2 Twp.	Timber°	A. 50%	All
William Cochran Farmer (R. VIII-3941)	Linn	3 Twp.	Timber°	A. 80%	All
H. Shelton Farmer (R. VIII-4053)	Linn	4 Twp.	Timber°	A. 75%	All
W. H. Young Farmer (R. VIII-4060)	Linn	3 Twp.	Timber°	A. 65% to 75%	All
N. J. Morrison Ex-Farmer (R. VIII-4068)	Linn	6 Twp.	Timber°	A. 70% to 75%	All

"A"	"B"	"C"	"D"	"E"	"F"
C. E. Clark Farmer-Sawmill (R. VIII-4079)	Linn	4 Twp.	Timber°	A. 40% to 60%	All
Michael Keibelbeck Farmer (R. VII-3245)	Lane	4 Twp.	Timber		All except 2 or 3 sec- tions
N. H. Martin Ex-Farmer Timber Cruiser (R. VII-3300)	Lane (South)	18 Twp.	Timber°	A. 25% to 160 acres	85%
James Whiford Timber (R. VII-3294)	Lane	All		A. 50% G. 50%	All
O. J. Lawrence Cross-Comp. (R. VII-3257)	Lane	3 Twp.	Timber°		All
O. M. Carlson Farmer (R. VII-3758)	Lane	3 Twp.		A. 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
John T. Deadmond Ex-Farmer (R. VII-3768)	Lane	5 Twp.	Timber— Burn	A. 33% to 50%	All
Cal. Hileman Farmer (R. VII-3367)	Lane	3 Twp.		A. 50% G. 50%	All
J. P. Currin Surveyor (R. VII-3389)	Lane	South part		A. 30% to 40% Fruit on rough land	Large ma- jority of land
W. J. Pengra Farmer (R. VII-3442)	Lane	2 Twp.	Timber°	A. 50% G. 50%	Depend on man
W. A. Reene Farmer (R. VII-3449)	Lane	12 Twp.	Timber°		75%
D. P. Caldwell Farmer (R. VII-3501)	Lane	5 Twp.		A. 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
J. E. Kennerly Farmer (R. VII-3788)	Lane	6 Twp.	Timber	A. 33%	All
J. M. Withrow Farmer-Logger (R. VIII-3800)	Lane	8 Twp. 1 Twp.		A. 50% A. 25%	All All
Jas. W. Kinman Farmer (R. VIII-3815)	Lane	2 Twp.		A. 25%	All
R. G. Baldersee Cross-Comp. (R. VIII-3833)	Lane	2 Twp. 3 Twp. 1 Twp.	Timber Timber Timber	A. 80% A. 50% A. 70%	All All All
E. C. Lake Cross-Comp. (R. VIII-3835)	Lane	1 Twp.	Timber		All
Chas. M. Collier Surveyor (R. VIII-4621)	Lane	All		A. 50%	75%

"A"	"B"	"C"	"D"	"E"	"F"
N. H. Martin Ex-Farmer Timber Cruiser (R. VII-3300)	Douglas	28 Twp.	Timber ^c	A. 25% of each 160 acres	85%
W. A. Bogard Ex-Farmer Timber Cruiser Real Estate (R. VII-3659)	Douglas	33 Twp.	Timber ^c Open ^c	A. 35%	All
B. F. Shields Ex-Farmer Timber Cruiser (R. VII-3581)	Douglas	50 Twp.	Timber ^c	A. 25% to 40%	All
Grant Taylor Timber (R. VII-3718)	Douglas	10 Twp.	Timber	A. 50%	33 1-3%
G. E. Keller Farmer (R. VII-3722)	Douglas	4 Twp.	Timber ^c	A. 66%	50% to 75%

"A"	"B"	"C"	"D"	"E"	"F"
John Neuner Ex-Farmer Timber Cruiser (R. VII-3731)	Douglas	25 Twp.	Timber°	A. 25% to 75%	70% to 75%
H. J. Miller Ex-Farmer (R. VII-3747)	Douglas	7 Twp.	Timber°	30%	All
A. Creason Stock (R. VII-3338)	Douglas	All except N. W.		A. 70% to 80%	All
W. C. Tipton Farmer-Stock (R. VII-3409)	Douglas	18 Twp.	Timber°	A. 75%	65% to 70%
J. L. Boyle Farmer Dep. Assessor (R. VII-3519)	Douglas	5 Twp.	Timber°	A. 50%	All
C. S. Jackson Ex-Farmer Lawyer (R. VIII-4099)	Douglas	1½ lands	Timber°	A. 75% to 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
I. B. Spiker Stock (R. VII-4176)	Douglas	3 Twp.	Timber°	A. 50% to 75%	All
Chas. M. Collier Surveyor (R. VII-4261) (Ex-Co. Surveyor- City Engineer of Eugene, Ore.)	Douglas	North part		A. 50% G. 50%	75%
W. A. Bogard Ex-Farmer Timber Cruiser (R. VII-3659)	Josephine	8 Twp.	Timber°	A. 35%	All
W. H. Miller Ex-Farmer Merchant (R. VII-3427)	Josephine	8 Twp.		A. 66%	All
George W. Kearns Timberman (R. VII-3980)	Josephine	All	Timber°	A. 25% to 50%	50%

"A"	"B"	"C"	"D"	"E"	"F"
W. B. Sherman Fruit Raiser Real Estate (R. VIII-4199)	Josephine	All except Forest Reserve	Timber— Brush— Open	A. 50%	75%
M. F. McCown Former Timber Cruiser for Southern Pacific Company (R. VIII-4259)	Josephine	All		25 to 30 acres to 1/4 sec- tion, tilla- ble	
W. R. Lamb Farmer (R. VII-3581)	Jackson	6 Twp.	Timber°	A. 60%	75%
Charles Randles Farmer-Stock (R. VII-3589)	Jackson	5 Twp.	Scattering timber	A. 40%	80%
Chas. A. Edmonson Farmer (R. VII-3611)	Jackson	6 Twp.	Timber— Prairie	A. 50%	75%

"A"	"B"	"C"	"D"	"E"	"F"
W. T. Huston Farmer (R. VII-3623)	Jackson	6 Twp.	Timber°	A. 50%	75%
J. W. Hays Farmer (R. VII-3639)	Jackson	9 Twp.	Scrubby tim- ber	A. 35% to 40%	All
J. W. Kelsoe Farmer (R. VII-3649)	Jackson	2 Twp.		A. 50%	All
W. A. Bogard Ex-Farmer Timber Cruiser (R. VII-3659)	Jackson	1 Twp.		A. 35%	All
James S. Bailey Farmer Land Examiner (R. VII-3688)	Jackson	32 Twp.	Timber°	A. 50%	80%
W. H. Miller Ex-Farmer Merchant (R. VII-3427)	Jackson	12 Twp.		66%	All

"A"	"B"	"C"	"D"	"E"	"F"
C. F. Carter Farmer (R. VII-3496)	Jackson	4 Twp.			All
F. G. McWilliams Real Estate (R. VIII-3908)	Jackson	4 Twp.	Brush	A. 1-3	75%
H. S. Palmerlee Farmer (R. VIII-3926)	Jackson	10 Twp.	Timber ^o	A. 40% to 60%	All
Josiah H. Beeman Ex-Farmer and Miner (R. VIII-3947)	Jackson	All	Some timber	A. 50%	75%
E. J. Mahan Farming unsold granted lands (R. VIII-4132)	Jackson	7 Twp.	Light timber	Agr. All	All
W. B. Sherman Fruit Real Estate (R. VIII-4199)	Jackson	N. W. part		A. 50%	75%

"A"	"B"	"C"	"D"	"E"	"F"
E. J. Grover (R. VIII-4258)	Jackson	6 Twp.	Timber— Prairie	50%	75%
M. F. McCown Former Timber Cruiser for Southern Pacific Company	Jackson	All		25 to 30 acres to each $\frac{1}{4}$ section till- able	75%
(R. VIII-4259) W. A. Bogard Ex-Farmer Timber Cruiser	Coos	15 Twp.	Timber° Open°	A. 35%	All

OTHER MATTERS TESTIFIED TO BY ABOVE WITNESSES.

1. Value of timber on granted lands estimated at from 50 cents to \$1.00 per thousand feet board measure.
2. Best timber in grant sold. Timber light in many places. Many parts of grant open land. Considerable portion of southern portion of grants contain no timber.
3. Very few abandoned homesteads in timbered area of grant.
4. Sale of granted lands in large quantities, to others than actual settlers, and withdrawal of lands from sale, has retarded development and settlement of communities in vicinity of granted lands.

Due and legal service of the within brief is hereby acknowledged and copy received this — day of May, 1914.

Solicitors for Defendants and Appellants Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage (individually and as trustee).

Solicitors for Defendant and Appellant Union Trust Company (individually and as trustee).

Solicitors for Cross-Complainants and Appellants John L. Snyder, et al.

Solicitors for Interveners and Appellants William F. Slaughter, et al.

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IN
**The United States Circuit
Court of Appeals**
for the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD COMPANY,
a Corporation,
UNION TRUST COMPANY OF NEW YORK,
Individually and as Trustee, *et al.*,
Defendants and Appellants,
JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,
WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Brief of Union Trust Company

INDIVIDUALLY AND AS TRUSTEE, DEFENDANT AND APPELLANT

*Appeal from the District Court of the United States
for the District of Oregon.*

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
*Solicitors and Attorneys for Defendant
Union Trust Company, Individually
and as Trustee.*

JOHN C. SPOONER,
JOHN M. GEARIN,
Of Counsel.

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IN
**The United States Circuit
Court of Appeals**
For the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD
COMPANY, a Corporation,

UNION TRUST COMPANY OF NEW YORK,
Individually and as Trustee, et al.,
Defendants and Appellants

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants

WILLIAM F. SLAUGHTER, et al.
Interveners and Appellants

VS.

UNITED STATES OF AMERICA
Appellee

Brief of Union Trust Company
INDIVIDUALLY, AND AS TRUSTEE, DEFENDANT
AND APPELLANT

*On Appeal from the District Court of the United States
for the District of Oregon.*

This is an appeal by the defendant, the Union Trust Company, from the decree entered July 1, 1913, forfeiting to the complainant lands of the Oregon & California

Railroad Company, mortgaged by that Company to the appellant, as Trustee, to secure the payment of certain bonds of the Railroad Company.

BILL OF COMPLAINT

After setting out the citizenship and residence of the respective parties, the bill of complaint, in Paragraph II, recites the Act of Congress of July 25, 1866, entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific in California to Portland in Oregon." This act may be summarized as follows: (a) The Oregon & California Railroad Company, a California corporation, and "such company organized under the laws of Oregon as the legislature of said state shall hereafter designate," were authorized to construct a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California; (b) The California Company was to construct that part of the railroad and telegraph line within the State of California, from a line on the Central Pacific Railroad, north through the Sacramento and Shasta valleys to the northern boundary of the State of California. And the Oregon Company was to construct that part of the railroad and telegraph line within the State of Oregon, from Portland running southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, to connect with the part to be constructed by the first-named company; (c) The company first reaching the boundary line between California and Oregon had the right to continue to construct beyond that line with the

consent of the state within which the unfinished part lay, until the parts should meet (Sec. 1); (d) A grant was made to the said companies "for the purpose of aiding in the construction of a railroad and telegraph line, and to secure the safe and speedy transportation of the mail, troops, munitions of war, and public stores," of twenty alternate odd numbered sections of public lands, not mineral, per mile (ten on each side), with provisions as to indemnity lands, and for the sale of the even numbered sections within the grant, at double the minimum price of public lands, and for the protection of the pre-emption rights of actual settlers (Sec. 2); (e) The right of way through the public lands, to the extent of one hundred feet in width on each side of the railroad, and necessary ground for stations, etc., were granted to said companies, and also the right to use certain public materials (Sec. 3); (f) It was provided that patents should issue on report of Commissioners when twenty, or more, consecutive miles had been constructed (Sec. 4); (g) The grants are "made upon the condition that the said Company shall keep said railroad and telegraph in repair and use, and shall at all times transport the mail upon said railroad and transmit dispatches by said telegraph line for the Government of the United States when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph lines, at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United

States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road *at the cost, charge and expense of the corporation or company owning or operating the same when so required by the Government of the United States* (Sec. 5); (h) It was further provided "that the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith" (Sec. 6); (i) The companies are required to operate the two parts as a continuous line (Sec. 7); (j) In case the companies fail to comply with the terms and conditions required, namely: by not filing their assent as provided in Section 6, or by not completing the same as provided in said section, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." And in case the lines shall not be kept in repair, Congress may pass an act to put them in repair and apply the income to the repayment of the expense incurred (Sec. 8); (k) The 'Oregon & California Railroad Company' and the 'Oregon Railroad Company' shall be governed by the state laws in matters not provided for in this act (Sec. 9); (l) Min-

eral lands are exempted from the operation of the act, but such timber on them as shall be required to construct the road, is granted to the companies (Sec. 10); (m) Where the right of way does not pass over Government lands, the consent of the legislatures of their respective states shall be obtained by the companies, and they shall be governed by the statutory regulations in all matters pertaining to the right of way (Sec. 11); (n) "Congress may at any time, having due regard for the rights of said Oregon & California Railroad Company, add to, alter, amend or repeal this act." (Sec. 12).

The bill of complaint alleges that the sixth section of the Act of 1866 was amended by the Act of June 25, 1868, extending the time for the completion of the first twenty miles for eighteen months from the passage of the Act of 1868, and requiring the completion of at least twenty miles each two years thereafter, and the whole by July 1, 1880.

The complaint, subdivision III, sets out the attempted organization of the Oregon Central Railroad Company under the laws of the State of Oregon, on or about October 6, 1866, and the resolution of the legislature of Oregon adopted October 10, 1866, designating the Oregon Central Railroad Company as the company which shall be entitled to receive the lands granted, and all the benefits of the Act of July 25, 1866. (This company was known as the West Side Company). And that on May 25, 1867, the said company adopted a resolution accepting the Act of July 25, 1866, and filed its assent with the Secretary of the Interior on July 6,

1867, and on the 20th day of August, 1868, filed a general map of survey of the projected line of railroad in the office of the Secretary of the Interior. (The proposed line extended on the west side of the Willamette River from Portland, westerly to the village of Forest Grove, and thence southerly to and beyond the village of McMinnville.)

The complaint then sets out the attempted organization of the Oregon Central Railroad Company (East Side Company), on or about April 22, 1867. This Company projected its line of road on the east side of the Willamette River. The complaint alleges that on October 28, 1868, the Oregon legislature passed a resolution reciting the former resolution designating the Oregon Central Railroad Company as the company entitled to the lands granted by the Act of July 25, 1866, and that no such company existed, and that such resolution was adopted under a misapprehension of facts as to the organization and existence of such company, and that the designation of the company to receive the land in the State of Oregon granted, and the benefits conferred by the Act, yet remained to be made, and thereupon designated the Oregon Central Railroad Company, organized at Salem (the East Side Company), as the company entitled to receive the lands in Oregon, and the benefits of the Act of July 25, 1866. The complaint then alleges that the time to file an assent by the East Side Company (which would expire July 25, 1867), had expired, and that the East Side Company thereupon applied to Congress for an extension of time in which to file such assent, and that

the West Side Company likewise appeared before Congress and opposed the application, and thereupon Congress did grant the application of the East Side Company and passed an act under date of April 10, 1869, which allowed any railroad company theretofore designated by the Oregon legislature, in accordance with the first section of the Act of 1866, to file an assent within one year from the passage of the Act of 1869. That act provided "that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land," and provided further, "that the lands granted by the act aforesaid, shall be sold to actual settlers only in quantities not greater than one-quarter section to a purchaser, and for a price not exceeding \$2.50 per acre." That the East Side Company thereupon adopted a resolution accepting the grant, which was filed June 30, 1869, in the office of the Secretary of the Interior, and a map of survey and location of the first sixty miles of the projected line was filed October 29, 1869, and on the 24th day of December, 1869, the East Side Company completed the first twenty miles, which were examined and approved by Commissioners pursuant to Section 4 of the Act of 1866.

It is alleged that the West Side Company wholly failed to complete the construction of any part of its line, and in or about the month of January, 1870, acquiesced in the substitution of the East Side Company as the recipient of the grant, and that no right,

title or interest thereto passed to that company. In the meantime, the East Side Company became involved in litigation, questioning the validity of its incorporation and organization, and its right to its corporate name; and for that reason its officers, on or about March 17, 1870, organized the Oregon and California Railroad Company under the laws of Oregon, for the purpose of receiving and exercising the grants, franchises and privileges of the Act of July 25, 1866, and thereupon the East Side Company transferred to the Oregon and California Railroad Company all its property and its rights under the said act, and it is alleged that the purpose, intent and effect of this transfer was not to operate as a sale, but to constitute the Oregon and California Railroad Company, the successor in interest of the East Side Company, subject to all the terms and conditions of the act. And that on April 4, 1870, the directors of the Oregon and California Railroad Company adopted a resolution, a copy of which is set out in the bill (p. 26, Record), wherein, after reciting the purchase of the property and franchises of the East Side Company, including its interest in the lands and benefits under the Act of 1866, the Company accepted the grant upon the terms and conditions therein specified, and directed that copies of the resolution and conveyance be filed in the office of the Secretary of the Interior, which was done.

The complaint further alleges, subdivision IV, that the West Side Company, having abandoned and waived all claim to the grants, franchises and other benefits of the Act of 1866, applied to Congress for a similar

grant to aid in the construction of its projected line upon the west side, and thereupon an act was passed entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," which was approved May 4, 1870. That act is set out in full in the bill of complaint at page 22. It conferred upon the West Side Company a grant of each alternate odd section to the extent of ten such alternate sections per mile on each side of the road. It contained a provision that as the company filed with the Secretary of the Interior maps of the survey and location of twenty or more miles of the said road, the Secretary should cause the granted lands coterminus with such located sections to be segregated "and thereafter the remaining public lands subject to sale within the limits of said grant, shall be disposed of only to actual settlers at double the minimum price for such lands" (Sec. 2). It made provision for the issuing of patents (Sec. 3), and further provided that the lands granted, excepting those reserved for depots, etc., "shall be sold by the company only to actual settlers in quantities not exceeding 160 acres, or a quarter section, to any one settler, and at prices not exceeding \$2.50 per acre" (Sec. 4). It also enacted as follows:

"Sec. 5. *And be it further enacted*, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more

productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks and wood yards, not exceeding Thirty Thousand Dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section."

And further:

"Sec. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

The complaint then alleges that the West Side Company adopted a resolution assenting to and accepting the provisions of the Act of July 20, 1870, and that all of the capital stock of the West Side Company was acquired by the owners of the capital stock of the Oregon and California Railroad Company, and that the affairs of the two companies were virtually conducted as a single enterprise until the dissolution of the West Side Company.

Under subdivision V, the bill of complaint sets out that by means of mortgage bonds, the Oregon Central Railroad Company (East Side Company), procured approximately \$8,000,000, and the West Side Company \$2,000,000, with which the line of the former was extended by January 1, 1873, to Roseberg, a distance of 197 miles, and the latter to McMinnville, a distance of 47 miles. At the date last mentioned, both companies were insolvent, and work was suspended, and was never resumed by the West Side Company (p. 34). About July, 1874, the direction and control of both companies was taken by the "Bond Committee," who acquired all the outstanding stock of both companies. In 1880 the West Side Company conveyed all its property to the Oregon and California Railroad Company, and was dissolved.

Under subdivision VI of the complaint, the reorganization of the Oregon and California Railroad Company is set forth (p. 36), and the making of a deed of trust for preferred stockholders to Henry Villard and others, of whom the defendant, Stephen T. Gage, is the surviving trustee. It recites the issuing of first and sec-

ond mortgage bonds, and the subsequent insolvency of the company, and the appointment of a receiver in 1885, and the suspension of the work, which was not resumed until April, 1887. By the latter date, patents had been issued to the Oregon and California Company for 323,000 acres of land, and no patents had been issued for the West Side grant (p. 40). The part of the West Side line extending from Forest Grove to Astoria, was not constructed, and in 1885 Congress forfeited the grant contiguous to that portion of the line (Act of January 31, 1885). (United States vs. Oregon and California Railroad Company, 164 U. S. 525.)

The complaint alleges that "of the aforesaid granted lands, approximately 250,000 acres had been sold prior to the 12th day of May, 1887, and your orator is informed and believes, and therefore states, that nearly all of the lands so disposed of were sold to actual settlers, and in small quantities, although in many instances in quantities and for prices slightly in excess of the aforesaid limitation prescribed by said land grants respectively."

Under subdivision VII, the complaint sets forth the formation of the Southern Pacific System, the acquisition by the Southern Pacific Company of the bonds and stock of the Oregon and California Railroad Company, an agreement, of which a copy is attached to the complaint as Exhibit E, the completion of the road by the Pacific Improvement Company, which it is alleged was owned and controlled by the Southern Pacific Company, the lease of the railroad and telegraph lines by the Oregon and California Rail-

road Company to the Southern Pacific Company, the mortgage to the Union Trust Company to secure bonds, of which \$17,500,000 are now outstanding.

Under subdivision VIII, the complaint alleges that until about the year 1893, there was no marked change in the disposition of the lands, but that after that the lowest price for which lands were offered for sale was greatly in excess of \$2.50 an acre; that for the purpose of protecting itself from responsibility for violation of the terms of the grants, the Oregon and California Railroad Company and the Union Trust Company adopted quit-claim form of contracts and conveyances. That between the years 1894 and 1905, approximately 2,450,000 acres were patented under the East Side grant, and 128,000 acres under the West Side grant. The complaint then alleges that the defendants "from about the year 1894 until about January 1, 1903, sold and disposed of said granted lands in manner and upon terms in violation and breach of the aforesaid terms and conditions of said land grants respectively, and with the sole object of securing the greatest possible financial benefit therefrom; and in that behalf a large quantity of said lands was sold to speculators and others than actual settlers, and for speculation and purposes other than actual settlement; and in quantities greatly in excess of one quarter section to one purchaser, to wit: in quantities from 1,000 to 45,000 acres to a single purchaser, and for prices greatly in excess of \$2.50 an acre, to wit: for prices from \$5 to \$40 per acre." Attached to the complaint is Exhibit J, showing the lands conveyed, the quantity and the price.

Under subdivision IX, the complaint alleges that on January 1, 1903, there remained unsold of the granted lands 2,373,000 acres, of which approximately 2,080,000 had been patented, and 293,000 were unpatented; that approximately 1,800,000 acres are situated south of Eugene, and constitute approximately one-half of the lands within forty miles of a railroad from Eugene to the state line; that since January 1, 1903, certain persons have applied to the railroad company to purchase unsold lands in quantities of 160 acres, intending and desiring to purchase them for the purpose of actually settling thereupon and making a permanent home thereof, and that several of said applicants have actually settled and established a permanent home on the land, and that the applicants tendered to the railroad company \$2.50 per acre; that a large number of persons are ready and willing to settle upon and purchase the land for the purpose of actual settlement "in quantities, for the prices and upon terms as prescribed by the said land grants," but that the railroad company has withdrawn the lands from sale and refused to sell to said applicants. The complaint alleges a combination between the railroad company and the Southern Pacific Company to create and maintain a monopoly, and to control and restrain the commercial and industrial development of the territory tributary to the railroad lines, and that such development has been retarded thereby (pp. 60 and 61). It alleges that none of the lands have been reduced to possession by the railroad company, and that they are of the reasonable value of \$40,000,000.

Subdivision X of the complaint sets out certain benefits that the Oregon and California Railroad Company has derived other than from the purchase price of the lands. For instance: payments on contracts which have been forfeited; rents from leased lands and the sale of timber.

Subdivision XI of the complaint charges waste committed by the company upon the lands.

Subdivision XII of the complaint charges the railroad company with concealment of sales in excess of 160 acres, and at prices in excess of \$2.50 per acre, and ignorance thereof on the part of the Government, and charges the railroad company with false and deceitful representations as to the reasons why sales were not made after 1903.

Subdivision XIII of the complaint sets out that a memorial was presented to the United States charging the facts as above stated, and thereupon a joint resolution was adopted by Congress, which is set out in the complaint at page 67, by which the Attorney General was authorized and directed to institute and prosecute suits, actions and proceedings at law or in equity which he might deem adequate to enforce the rights and remedies of the United States arising out of the Act of July 25, 1866, the Act of June 25, 1868, the Act of April 10, 1869, and the Act of May 4, 1870; and in and by such suits, actions and proceedings, assert all rights and remedies in favor of the United States relating to the subject of such suits, actions and proceedings, including the claim that the lands granted by each of said Acts, have

been forfeited by reason of any breach or violation of any of the terms or conditions of either or any of said Acts, which may be alleged and established in any such suit, action or proceeding, "it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions or proceedings to assert, on behalf of the United States, and the Court or Courts before which such suits, actions or proceedings may be instituted or pending, to entertain, consider and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found, to enforce the same."

Under subdivision XIV, the complaint alleges that certain of such granted lands are forfeited, to wit: all the unsold lands, and all rights of defendants under the land grants, and adds: "pursuant to the authority and direction contained in said joint resolution of Congress, approved April 30, A. D. 1908, your orator does hereby assert title to, and does hereby resume the title of, all of said lands and estates in lands forfeited to your orator as aforesaid." The bill then excludes from the operation of the forfeiture such of the granted lands as were theretofore sold.

Under subdivision XV of the complaint, it is alleged that the property described (not including any of the said granted lands) in the mortgage to the Union Trust Company is of a value greatly in excess of the bonded indebtedness, but it denies that the Union Trust Company, as trustee, or otherwise, or any other person, has

any right, title, interest or lien in, to or upon any of said lands by virtue of said mortgage deed.

In subdivision XVI of the complaint it is alleged that pursuant to the rules of the Department of the Interior, all the patents were issued and based upon applications in writing, filed by the Oregon and California Railroad Company containing lists of the lands claimed, each of which was accompanied by an affidavit to the effect that *all the lands so claimed were of the character contemplated by the grant, and that the patents were issued in reliance upon this statement.*

In subdivision XVII of the complaint, it is alleged that in the conveyance made by the Railroad Company, *it reserved the right of way, and other benefits, all of which, it is averred, should be forfeited.* Other formal matters are set forth in the subdivisions XVIII, XIX and XX.

The relief sought is an adjudication that the unsold lands be forfeited to and reinvested in the United States, quieting the title in the United States, or, in the alternative, that it be adjudged that the unsold lands are subject to purchase by a sale and conveyance to actual settlers in quantities not exceeding 160 acres, for a price not exceeding \$2.50 per acre, and that a receiver be appointed and vested with title and possession to such lands, and be authorized and directed to sell to persons of the character and in the quantities and at the prices aforesaid; and provides for the care of the property, and for an accounting.

Or, in the alternative, that a mandatory injunction issue requiring the Oregon and California Railroad

Company to offer the unsold lands for sale, and to sell them to any bona fide settler who may apply to purchase, in quantities not exceeding 160 acres, for the price of \$2.50 per acre, in such manner as the Court shall deem adequate and expedient.

Or an injunction enjoining the defendants from making a sale of the property, or from committing waste.

That the Oregon and California Railroad Company, Southern Pacific Company and the Union Trust Company account for all moneys which they have received for lands sold to other than actual settlers, in quantities exceeding 160 acres and for a price exceeding \$2.50 per acre. That the other defendants be enjoined and restrained from proceeding with suits instituted by them, and for other general relief.

DEMURRER AND DECISIONS THEREON

The Oregon and California Railroad, Stephen T. Gage and the Southern Pacific Company, interposed separate demurrers "upon the ground of no equity as to subject matter, discovery or relief." No demurrer was interposed by the Union Trust Company to the Government's bill; but it interposed a demurrer to each of the cross bills and petitions in intervention filed by the other defendants. The demurrer to the cross bills was sustained, but the demurrers by the railroad company, Gage and the Southern Pacific Company were

overruled by Judge Wolverton, who filed an opinion, which, for the reasons hereafter to be stated, it becomes necessary to examine with care.

The grounds of demurrer urged by the railroad company and the other demurrants were:

(1) That the proviso of the Act of 1869 did not become obligatory because the title to the land grant had passed to the railroad company previous thereto, and that Congress was without power to attach a limitation or condition to the absolute fee already vested in the railroad company.

(2) That the proviso did not create a condition subsequent, but was a personal covenant, the specific performance of which could not be enforced.

(3) That if the proviso be regarded as a condition, and if there had been breaches thereof, the complainant had waived the same and acquiesced therein.

(4) That *the land patents were conclusive*, but that if void—the title was confirmed by the Acts of *March 3, 1891, and March 2, 1896*, which bar the suit as to all lands patented prior to October, 1902.

(5) That a Court of Equity was without jurisdiction to declare or enforce a forfeiture. That the grantor had not declared such forfeiture, nor had such forfeiture been adjudged at law, and therefore, this suit could not be maintained.

Each of these grounds of demurrer was overruled by Judge Wolverton. He held that the title to the land grant had not vested in the Oregon and California

Railroad Company at the time of the passage of the Act of 1869, by reason of the failure of that company to file an assent as required by the sixth section of the Act of 1866, and that by availing itself of the right to file such assent conferred by the Act of 1869, it became obligated by all the terms and conditions of that Act. (Opinion, pp. 733-742.)

He held that the issuance of patents to such of the lands comprised in the grant as had been patented, did not supersede or annul the requirements of the Act of 1869. (Opinion, pp. 745-752.)

He held that there was nothing contained in the bill of complaint to show that the Government did more than remain silent while the Oregon and California Railroad Company was disposing of the lands in violation of the condition, if it be a condition, and therefore, there was no waiver or acquiescence on the part of the Government in the mode of disposition of the lands adopted by the railroad company; and that the Acts of September 29, 1890, and January 31, 1885, could not be construed as a waiver of forfeiture of the lands not forfeited by those Acts.

He also held that the statutes (Sec. 8 of the Act of March 3, 1891, 26 Stat. 1099; and Sec. 1 of the Act of March 2, 1896, 29 Stat. 42), limiting the time within which suits could be brought to vacate and annul patents to lands, did not limit the time within which an action could be brought to forfeit the lands in question for a breach of condition.

Coming to the crucial controversy, he held that the proviso in question was a condition subsequent, and

not a covenant or trust obligation. That the condition was that the granted lands should be sold to actual settlers only, in quantities not greater than one quarter section; and he held that the allegations in the bill of complaint to the effect that the defendant company had sold certain of the lands in quantities in excess of 160 acres to one purchaser, and for a price in excess of \$2.50 an acre, was a ground of forfeiture of all the lands unsold, as prayed in the bill of complaint. This conclusion was reached largely by a process of reasoning from the legislative intent, as shown by what transpired in Congress in connection with the passage of the Act of 1870, and the history of Congressional land legislation, that inasmuch as one of the purposes thereby disclosed was to secure the distribution of the public lands among actual settlers in order to build up the public domain, that this proviso should be construed in a light most favorable to attain that purpose. Having considered the Congressional discussion and legislation, he proceeds to the application of the rule that public grants should be construed in a sense favorable to the grantor, although it is said that inasmuch as the Government was to receive a consideration for its grant, namely: the transportation of its mail, troops, munitions of war, etc.—if this were a purely private grant, the absence of technical words appropriate to the creation of a condition subsequent, would evidence an intendment not to create such a condition.

The Court also found that the language of the Act of May 4, 1870, which contains no technical words that

at common law would indicate a condition, none the less imports a condition.

A considerable part of the opinion is taken up with a discussion of the rights of the cross-complainants, who claimed that the railroad company took the lands upon an executory trust to be administered by it in behalf of any citizen who should become, or who in good faith purports to be, an actual settler upon the land, and that the railroad company became obligated as such trustee in the performance of its trust, to sell to such person the land claimed by him, to the extent of 160 acres at the rate of \$2.50 per acre. The Court refused to yield to this contention, and sustained the demurrer as to the cross-complainants. This appellant leaves the consideration of that question to the brief in reply on the appeal of the cross-complainants. Finally, the Court considers the contention of the railroad company that the suit could not be maintained as one to enforce a forfeiture, nor to quiet title, because the Government had not declared a forfeiture, nor had the fact of forfeiture been adjudicated by a court of law, while the defendant railroad company holds the legal title, and is in actual possession. The conclusion reached by the Court was that:

“While Congress has not declared a forfeiture leaving the judicial inquiry to follow, it has clothed the Attorney General with ample authority to institute a suit for determining whether forfeiture has been incurred or not, and the facts being such that equity may entertain jurisdiction of the cause,

there remains no reason why it should not be maintained.”

A review of the reasons given by the Court in reaching this conclusion, is reserved for the body of the brief.

ANSWER

The answer of the Union Trust Company admits the various acts of Congress, resolutions and legal proceedings set forth in the bill of complaint. It denies the inferences and conclusions drawn therefrom adverse to the interests of the railroad company and to this defendant. It is unnecessary to state with minuteness all the admissions and denials of the answer. It is enough to refer to those which raise the issues which were intended to be presented upon the trial.

Referring to the allegations contained in the paragraphs of the complaint numbered VIII, IX, X, XI and XII, to the effect that the railroad company had sold granted lands in quantities in excess of 160 acres to one purchaser, and for prices in excess of \$2.50 an acre, and that in 1903, and thereafter, it had withdrawn the lands from sale, this defendant, at paragraph IX of the answer, denies that the railroad company “on or about the year 1894 until about January 1, 1903, or at any time, sold or disposed of said granted lands, or any part thereof, in manner or upon terms in violation or breach of the aforesaid terms or conditions of the said land grants, or either of them.”

The defendant admits "that some of said lands were sold to persons who were not actual settlers thereon, and did not purchase the same for purposes of actual settlement, in quantities exceeding a quarter section to one person, and at prices exceeding \$2.50 per acre."

It admits that in several instances lands in quantities of from 1,000 to 20,000 acres were sold to purchasers, at prices ranging from \$5 to \$20 per acre. In one instance at \$35 per acre, and in one instance at \$40 per acre, and in one instance a sale in excess of 20,000 acres, and of 45,000 acres at \$7 per acre, was made to a single purchaser.

The defendant admits "that since January, 1903, and principally since the passage on or about February 14, 1907, by the legislature of the State of Oregon of the memorial, a copy of which is attached as Exhibit L to the bill, communications have been received by the defendant, Oregon and California Railroad Company, purporting to be the several applications of persons, exceeding one thousand in number, to purchase certain of said unsold lands, generally designated and described in such communications as a single 160-acre tract, or quarter section, subdivision, to each person named;" but the defendant "denies that said applicants intended or desired to purchase the lands so applied for to be purchased by them, or in their names, respectively, for the purpose of actual settlement thereupon, or making a permanent or any home thereon; and it denies, upon information and belief, that several of said applicants had actually settled or established a permanent or any home upon the lands so applied for

by them, or in their names, respectively," and that the applicants tendered the sum of \$2.50 per acre.

The defendant denies that a large, or any number of persons, are ready and willing to settle upon said lands, or to purchase the same for the purpose of actually settling thereupon, or of making a permanent or any home thereupon, in quantities not exceeding 160 acres to each person, or for the price of \$2.50 per acre, or upon any terms prescribed by the said land grants, or either of them, or are deterred therefrom by the defendant, Oregon and California Railroad Company, as stated in the bill, or at all; *and this defendant, upon information and belief, avers that the said lands generally are essentially timber lands, not susceptible of actual settlement, or the establishment of permanent or any homes thereon; and further, that all lands of the said land grants now, or at any time susceptible of actual and permanent settlement, or the establishment of homes thereon, at no time exceeded approximately 300,000 acres, consisting of small and widely separated tracts, all or nearly all, of which were sold to actual settlers or persons claiming to be such, during construction and prior to the completion of said railroad, respectively, in quantities of 160 acres, or less, to a single purchaser, at prices not exceeding \$2.50 per acre; and this defendant avers, upon information and belief, that at the time said grant of July 25, 1866, was made by Congress, and the line of said railroads located, a large part of the lands susceptible of actual settlement and cultivation, within the ten miles, or grant limits, of said grant, had been occupied by actual settlers, pre-empted or*

otherwise disposed of, and that the railroad company was obligated to take, and did take in lieu thereof, under the direction of the Secretary of the Interior, in the indemnity limits of said grants, *lands which were valuable chiefly, if not wholly, for the timber growing thereon, and were not susceptible of actual settlement, residence and cultivation.*"

The defendant also avers "that the said applications to purchase said lands set forth in the bill and referred to above, were made by persons desiring to obtain title to said respective quarter sections because of the timber thereon, and not otherwise, and for the purpose of speculation only, and not in good faith, as actual or any settlers; and that the said lands were chiefly, and in most instances solely, of value because of the timber thereon, and were not arable or susceptible of actual settlement and cultivation." (P. 1200.)

Defendant denies that the railroad company "has at any time refused, or still refuses, to sell any part of said unsold lands to actual settlers, or for purposes of actual settlement, or in quantities or for purposes as prescribed by any terms of the said land grant acts, or either of them, or at all."

It also admits that the railroad company has at all times refused, and still refuses, to entertain the pretended applications to purchase, or to sell any of the timber lands applied for as set forth in the bill, to the persons who made, or in whose names were made, the said pretended applications, upon the terms offered

therefor in said pretended applications; but upon information and belief, the defendant denies that ever since January 1, 1903, or at any time, the defendant, Oregon and California Railroad Company, has failed or neglected to encourage or promote the settlement of any of the said lands which are susceptible of settlement and the establishment of homes thereon, or the purchase thereof by actual settlers for the purpose of actual settlement."

And it denies that the railroad company "has at all or any times encouraged, obstructed, forbidden or prevented the settlement of any of said lands which are susceptible of settlement, or the purchase thereof, or any part thereof, upon terms prescribed by the said land grants, or either thereof, either by actual settlers or for the purpose of actual settlement."

The defendant avers that the railroad company is in open and notorious possession of, and dominion, of the said lands, as follows: "The said company has at all times openly and notoriously claimed, and prior to about the time of the commencement of this suit was recognized as, and admitted by all to be, such owner thereof; has at all times openly and publicly mortgaged, leased and offered for sale the said lands; has at all times caused the said lands to be protected by field agents who traveled over and protected the land against depredations and waste; has at all times, since the same were patented to it, paid the taxes levied and assessed upon and against the said lands, which payments amount in all to \$1,827,234.10; and in divers other ways has

openly and notoriously proclaimed and asserted, and been in, possession of the said lands." (P. 1204.)

The defendant admits and avers "that prior to the completion of the said railroad, timber lands, not being susceptible of settlement or the establishing of homes thereon, had but little, if any, market value, and could not be sold at any price to any person." (P. 1206.)

The defendant also avers "that nearly all of the said lands remaining unsold at the time of the completion of the construction of the East Side Railroad, and its connection with the Central Pacific Railroad, as afore-said, were timber lands having small market value, and for which there was substantially no demand by purchasers at the time, but it avers, upon information and belief, the fact to be that soon after facilities for transportation of lumber were afforded by the completion and connection of the said railroads, even numbered sections were entered by persons under the Timber Land Act, and the commutation provision of the Homestead Act, who thereupon conveyed the lands so entered to single holders of many such adjoining tracts, and the increase in value of the Oregon and California Railroad Company's intermediate odd sections of timber lands, arose out of the said completion and connection of railroads, and the demand for such lands at increased and gradually increasing prices, arose out of the name of ownership of the odd sections by the owners of the intermediate even sections, who desired, or sought to procure, sufficiently large single timber land holdings to justify the establishment and equipment of lumber mills and fac-

tories to mill and market the timber product of said lands." (P. 1208.)

The defendant further answering, avers "that the complainant at all times acquiesced in all and in many instances approved and ratified, certain of said transactions, and that a few of the many instances of such acquiescence, approval and ratification, other than those hereinbefore and hereinafter set forth, are shown by Exhibit No. 9 and Exhibit No. 10, attached to the joint and several answers of the defendants, Oregon and California Railroad Company, and others.

The defendant claims that it has an interest in the unsold lands under the mortgage made to it. It denies that the lands are of a value in excess of the bonded indebtedness secured by the mortgage deed, and it avers that it is impossible to foresee what the value of said property will be in the year 1927, when the bonds secured by said mortgage deed will become due. And it avers that the proceeds of the said bonds were used by the Oregon and California Railroad Company, and by the West Side Company, in constructing a railroad and performing the conditions of the Acts of 1866 and 1870, and that by the construction of the roads, the Oregon and California Railroad Company acquired an indefeasible title to the lands, and it avers that without the land grant and the mortgage thereof the funds could not have been secured for the construction of the railroads, or either of them, and that the pledge by way of mortgage deed of the lands constituted a valid application thereof, under the grant, as required by the Act of 1866; and that such mortgage did not constitute

a sale within the meaning of the Act of Congress. That the bonds had been negotiated abroad, and are held by bona fide purchasers, and that if it be true, which it denies, that the lands are held by the railroad company upon condition of sale to actual settlers only, as aforesaid, and if a relatively small proportion of said lands had been sold in breach of said conditions, as the bill alleges, "it would be harsh and contrary to equity to deprive by forfeiture the bondholders under said mortgage deed of the security on the face of which they purchased said bonds." (Pp. 1215 and 1216.)

As a special defense the defendant sets up the Act of Congress approved June 19, 1878, entitled "An Act to create an auditor of railroad accounts, and for other purposes" (Paragraph XXI), which provided that the office of auditor of railroad accounts should be established as a bureau of the Interior Department, and which made it the duty of the auditor under the direction of the Secretary of the Interior to prescribe a system of report to be rendered by the railroad companies to which the United States had granted any subsidy in bonds or land. To examine the books and accounts of such railroad company once each fiscal year; to determine the correctness of any report received from them; "to see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariff for freight and passengers, and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the Government; and to

make an annual report to the Secretary of the Interior on the 1st day of November, on the condition of each of said railroad companies, their road, accounts and affairs for the fiscal year ending June 30 immediately preceding." And it contains certain other provisions set forth in the answer; and it is alleged that by the act approved March 3, 1881, the title of the said official was changed from "Auditor of Railroad Accounts" to "Commissioner of Railroads." It is alleged that the bureau was organized by the Department of the Interior, as required by said Act of Congress, and was active until the termination of said office in 1904. The answer sets forth the report made by the Oregon and California Railroad Company for the half year ending December 31, 1879, and consecutively thereafter to and including June 30, 1903, each of which states the cash receipts from sales of lands to date, the average price per acre, the average price per acre during the half year, the maximum price per acre from sales, the minimum price per acre from sales, the maximum price per acre now asked and the minimum price per acre now asked. (Pp. 1226-1247.)

The answer further alleges that the chief of said bureau complied with the requirements that he should make an annual report to the Secretary of the Interior; that said reports were embodied in the annual reports of the Secretary of the Interior during each year from 1879 to the termination of said office in 1903, and were by him transmitted to the President of the United States, and by the latter transmitted to the two houses

of Congress, and there referred to appropriate committees and printed as executive documents. That in many of said reports the Commissioner of Railroads stated the maximum price which the Oregon and California Railroad Company was demanding per acre on sales of the lands of said land grants. Each of the reports states the average price per acre received by the company. (Pp. 1247-1262.)

The allegation of the answer is to the effect that information was brought home to the administrative officers of the Government and to Congress, that the railroad company did not consider itself obligated to sell all the lands included in the grant in quantities of 160 acres only to one purchaser, and at a price of \$2.50 per acre; and that the complainant acquiesced in this construction of the proviso and continued, year by year, to issue to the railroad company patents for the lands so granted, although having full knowledge of the mode in which the railroad company was disposing of said lands.

The answer further alleges that the granted lands were mortgaged to this defendant by a deed dated July 1, 1887 (Exhibit H, attached to the complaint), to secure the payment of money secured by the bonds of the company; but for many years before the making of the said deed of trust and the issuing of the said bonds, the course of dealing by the said company in the sale of the said lands, well known to the complainant, had been to make sale of certain of said lands in quantities greater than 160 acres to a single purchaser, and at prices in excess of \$2.50 an acre.

“That the bondholders advanced their money to aid in the construction of a railroad, and for the benefit of the complainant, relying upon the grant of said lands without any reason to believe that there was any possibility of such claims as are now asserted by the complainant, but on the contrary, having reason to believe, from the conduct of the complainant for many years, that there were no such claims to be asserted.” And this defendant claims a lien upon the property to the extent of \$20,000,000, and denies that its lien is subject to forfeiture, and avers that the right of forfeiture now claimed by the complainant is unjust and inequitable, and would deprive the bondholders of an important part of the security upon which they have advanced money with the full knowledge of and for the benefit of the complainant.

For a separate answer, the defendant alleges that all the causes of action set forth in the bill are barred. (Paragraph XXIII.)

(a) By Section 3901 of Lord’s Oregon Law.

(b) By Section 8 of the Act of Congress approved March 3, 1891, entitled “An Act to amend Section 8 of an Act approved March 3, 1891, entitled ‘An Act to repeal timber culture laws, and for other purposes,’ ” published in Volume 26, Statutes at Large, 1093.

(c) By the first section of the Act of Congress approved March 2, 1896, entitled “An Act to provide for the extension of time in which suits may be brought

to vacate and annul land patents, and for other purposes," published in Volume 29, Stat. L., p. 42.

(d) By acquiescence and laches of complainant; and that the United States has exercised and waived any right of forfeiture to the said lands which it may have had by reason of the passage of the Act of June 31, 1885, entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," and the act of September 29, 1890, entitled "An Act to forfeit certain lands heretofore granted for the purposes of aiding in the construction of railroads, and for other purposes."

The defendant further alleges, by way of defense, that the Court, as a Court of Equity, is without jurisdiction to inquire into the alleged breach of a condition subsequent, as sought by the bill, or to decree the forfeiture of the said granted lands, or any of them; and, as incidental to such decree of forfeiture, to require an accounting and payment by this defendant.

A joint and several answer was also submitted on behalf of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage.

The denials and material allegations of defense set up in that answer are substantially similar to the denials and allegations of defense set up in the answer of this defendant.

PROOFS

Evidence on behalf of the complainant and the defendants was submitted before a master, but no findings were made by the Court. Hence, it becomes necessary to examine the evidence.

The questions of fact presented are, in the opinion of this appellant, of the utmost importance. We think it has been established by an overwhelming weight of evidence that the lands included in the grant were, for the most part, of such a character as not to be susceptible of actual settlement, and that the proviso in the Act of 1869 had no application to such lands. It is, therefore, indispensable to the argument as presented by this appellant that the Court should ascertain and determine the physical characteristics of the lands which were the subject of the grant.

The decree for the plaintiff is not based upon the conclusion that the lands included in the grant were susceptible of settlement; on the contrary, the decree proceeded upon the theory that a sale of any lands in the grant on terms other than those prescribed by the proviso, whether susceptible of settlement or not, was a violation of the condition and a ground of forfeiture. This appears from the opinion of the judge rendered at the time of the signing of the decree. Nor is it the rule that a decree in equity, like the verdict of the jury, presumes a finding of all the facts necessary to support the decree. Particularly is this true where it appears that all the evidence introduced before the trial court was in the shape of depositions and not given before

the Court orally (*Mt. Vernon Refrig. Co. v. Fred W. Wolf Co.*, 188 Fed. 160). Where the Court below has made no findings of fact nor recitals in the opinion, or otherwise of particular facts, a review of a decree in equity involves a reconsideration of all the evidence for the purpose of ascertaining the facts (*Gumaer v. Colorado Oil Co.*, 152 U. S. 88; *Johnson v. Harmon*, 94 U. S. 371.)

We proceed, therefore, to a consideration of the proofs with especial reference to the physical characteristics of the lands included in the grant for the purpose of reaching a conclusion regarding the extent to which they were or were not susceptible of settlement and cultivation. We shall first refer to the general characteristics of the country within which the grant was situated, and then consider such evidence as was submitted relating to the grant generally or to large portions of it, and then we shall group together the evidence as to the special characteristics of the lands granted in particular counties, and finally we shall formulate certain conclusions of fact bearing upon this subject gathered from the stipulated facts, the facts of which the Court will take judicial notice, and the evidence and exhibits submitted.

The General Features of the Country in Which the Land Grant is Situated

The railroad was projected to join the City of Portland at the north with the Central Pacific Railroad in California at the south, running for a distance of approximately 367 miles parallel with the Pacific Coast,

substantially through the valleys between the Coast range of mountains upon the west, and the Cascade range upon the east. This region of country in 1866 was for the most part unsurveyed. Its principal features are described in authoritative works of reference. Thus, from Lippincott's *Gazeteer of the World* we may take the following description:

"The coastal strip of Oregon is mountainous and broken, terminating in bold sea cliffs and passing interiorly into a partial plateau which is densely timbered, except in the south, where the 'bald hills' rise in an open prairie-like region with groves of timber. This tract is bounded eastward by the Coast and Umpqua ranges. Between these ranges on the west and the great Cascade range on the east, lie the fertile Willamette Valley and the upper river basins being separated by the transverse Calapooya and Rogue River mountains. The west flank of the Cascade range is a densely timbered and greatly broken region, of which only the valleys are arable. These mountains present many cones of recently extinct volcanoes. Mt. Hood, the loftiest, situated forty-five miles southeast of Portland, is 11,225 feet in height."

The Territory of Oregon was organized in 1848, and the State of Oregon was admitted into the Union in 1859. The population in 1860 was 52,465. The total area of Oregon is 95,274 square miles—or 60,975,360 acres. In 1870 the population was 90,423, (p. 7146, *Record*), less than one to a square mile, and at that time

the population was confined principally to Portland and a few smaller towns (7258) the Willamette Valley and the Valleys of the Rogue and Umpqua rivers (7253.)

A history of the settlement of Oregon is found in the testimony of Himes (2443, et seq.); Moreland (2461, et seq.); Eddy (2552). The first settlement of the Willamette Valley was made in 1843 (2552). Large areas of that valley are open plains. These lands as well as those in the Valleys of the Rogue and Umpqua rivers were largely taken up under the Donation Act. That Act was approved September 27, 1850 (9 Stat. L. 496). By it there was granted to every white settler above the age of eighteen, a half section, or 320 acres, and if married, 640 acres, a half to be owned by his wife. Four years of continued residence and cultivation were required before a patent could issue. The laws of Congress relating to pre-emption by individuals had at that time no application in Oregon, because public lands there had not then been surveyed. (*Starr v. Starr*, 6 Wall. 402). The Donation Act provided for a survey of the lands, but provided "that no other than township lines shall be run *where the land is deemed unfit for cultivation.*" The Donation Act was, therefore, confined to lands which were fit for cultivation, and as a consequence the open lands in the valleys to which we have referred were first taken up and settled (Eddy, 2558, 2559, 2560, 2561.)

The extent to which lands within the grant were taken up under the Donation laws appears from defendants' Exhibit 258 (6691). Thus, in the East Side grant the total number of acres in the primary limits

were 3,823,426.71; the acres lost by donation land claims were 1,143,925.70; in the West Side grant the total number of acres in the primary limits were 50,187.38; the acres lost by donation land claims were 197,692.94.

A map introduced in evidence as Exhibit 259 shows the place and indemnity lands within the ten-mile limit which were lost by disposition prior to the grant (McAllister, 1937-1940). A very large body of the lands so lost were disposed of under the Donation Act and subsequent settlement laws prior to 1866. These lands are marked on the map in yellow. This exhibit demonstrates how extensively the agricultural lands in the several valleys had been taken up previous to the Act of 1866.

Ascending from the valleys, the sides of the mountains exhibit from time to time terraces which are known as bench lands. These tracts of a few acres in extent when untimbered, or when the timber has been removed, frequently are susceptible of cultivation. Ascending further along the sides of the hills and mountains, the lands exhibit fewer spots susceptible of cultivation, although they occasionally occur. Testifying as to the general character of the country, Mr. McAllister says:

“There is a very large part of the land involved in this suit that never will be suitable for agriculture. There is another part that after the land is logged off, if developments in the way of transportation facilities and opening of the country are sufficient, or if they ever become sufficient to warrant the expense of grubbing out the stumps, the

land might then be used for agriculture; but that will be years and years from now. There may be some tracts that might warrant that expense in the near future, but they are a very small proportion of the whole." (2010.)

The total number of acres involved in this suit is 2,075,616.45. Of these 847,795.98 have been examined. Of those which have been examined, 78 per cent are classed as timber lands; 19 per cent as grazing lands and 2 per cent as agricultural lands (McAllister, 1946, 1947). This is elaborated on a tabulation produced by the witness and marked Defendants' Exhibit 262 (Vol. XIII, 6701). A map showing the timbered and untimbered lands of the grant and the topography of the land is marked Exhibit 260 (Vol. XIII, 6699; McAllister, 1947.)

Some of the lands included in the grant are at high altitudes. A map showing the altitudes of the unsold lands within the grant was introduced and marked Exhibit 266 (Vol. XIII, 6709; McAllister, 1954.)

Mr. Eberlein makes the following general statement with regard to the lands in suit:

"The general character of the land that he has been over in the grant of July 25, 1866, the northern part of that grant, the extreme northern end of that grant, that is about east and southeast of Portland, there is some very heavy timber. It is rough country and no large agricultural possibilities at all. As to the south end of that grant the land—practically all the unsold land—lies in the mountainous country or rough country,

very much broken. The best part of the timber lies in the extreme southern end of the grant; that is the sugar pine country, in Jackson and Klamath counties, but that country lies high, very dry and is cold. There are practically no possibilities in there, for extensive cultivation, because the land is not suited for it, the character of the land is thin and sandy. It will be a forest country always, and in his opinion it would not be susceptible to cultivation on account of the climatic conditions and soil, rock, etc., even if the timber were removed. He cannot speak, except in a general way, of the lands in the eastern part of Josephine County, east of the railroad and immediately north of Jackson County, having skirted that country east of the range. The general character of this land is timber and wood land, very rough and broken. The land in the eastern part of Douglas County, on the Umpqua River, and the streams that lead into the North and South Umpqua, is a good timber country. It is all timber, practically. The valleys are narrow, and it is valuable chiefly for timber, so held to be now. The timber lands in Lane County, on the head waters of the Willamette River, Coast Fork, Middle Fork and the McKenzie, are good timber lands, but in a rough country, what there remains. There are small patches of land all through the country, isolated tracts here and there, where, if the timber was removed, the land would be susceptible to agricultural purposes, but the country is full of land, the Willamette Valley is full of land, covered with brush now, that is very much better for cultivation than any

lands that he knows of, in this grant and more accessible to transportation.

If for no other reason the stumps would be prohibitive to the adaptability of this land for agricultural purposes, because of the character of the growth, especially the fir growth, which is the principal growth of the country tributary on the slopes into these interior valleys on the west of the summit of the Cascades, and that by its resinous character, its long tap roots, as everybody knows in this part of the country, are exceedingly hard to extract, and it costs from fifty to one hundred and fifty dollars an acre, that has always been his information, to clear the land of stumps, and there is plenty of land to be had in these interior valleys for less than that price. Well on toward 200,000 acres of this grant is rough, is absolutely barren, rocky slopes, without any possibility of growth of any kind. He would call it chaparral down to the lower country. The land that he speaks of has not even chaparral growth and would not even be goat pasture, and there is no value at all to that land that he knows of. You could not settle a colony of flies on there and get sustenance for them. He thinks it would not be valuable for a homestead or pre-emption if it were to become public land. It is just waste land, that is all. He can give only a general description of that land. He cannot give the particular section, township and range descriptions. He can only give the general locations. (Vol. V, 2275-2278). From the reports which were made to him by the field agents, Mr. Eberlein classified the lands within the grant as fol-

lows: 1,496,648 acres covered with timber and unsuitable for agriculture; 703,652 acres of grazing land, unsuitable for agriculture; 7,320 acres which might be used for agriculture, consisting of small isolated tracts, many of them remote from transportation and settlement, and scattered in small bodies in various spaces throughout the whole extent of the grant, along creek bottoms and on hillsides." (2290.)

Mr. Elliott (Vol. VI, 2714), now State Forester, whose first annual report is in evidence as Exhibit 360, was employed by the railroad company from 1889 to 1906. He assisted in cruising and classifying the lands, and was afterward chief land examiner. Mr. Elliott testified that he had cruised in all the counties except Curry (2717); that all lands that were considered unfit for cultivation were designated as grazing lands when denuded. Taking Southern Oregon, beginning with Douglas County, there is a great deal of land among the unsold portion that is barren, rocky or covered with chaparral or brush—practically worthless for any purpose—that was classified as grazing lands simply because it was of no value for anything else. It has more or less brush, chaparral and all kinds of brush on the land, and is rocky, very rough land. There is more or less scattered all through the grant back in the mountains and foothills. He presumes Douglas County has more than any other kind of this character of worthless land, because there is more railroad land in Douglas County. Josephine County would probably have a higher percentage of that kind of land than any other. Off hand, he would say that 40 per cent of the lands in

Jackson and Douglas counties would be worthless. The heaviest and most valuable timber lands of the grants are in parts of Columbia, Washington, Multnomah, Clackamas, Yamhill, Polk, Benton, Linn, Lane and Douglas counties. There are tracts of pretty good timber in Jackson and Josephine counties; also in Lincoln County. Coos County is a very heavily timbered county. The comparative stand of timber on the unsold lands compares favorably with the timber on the even sections, and with the timber in Western Washington and other parts of the world (2712-2718). The average value of the best unsold quarter sections of timber land you would be safe to say is \$3,000, and the maximum price \$10,000 (2720). Taking the grant as a whole, from five to ten per cent would be available for agricultural use (2724). The cut-over land should, in his judgment, be reforested (2724). If the land were sold at \$2.50 an acre in quantities not exceeding 160 acres, they would no doubt be purchased for the timber and would go into the large timber holdings (2722-2723). Lands acquired under the Homestead Act or under the Timber and Stone Act, or other public laws, in the even sections, have very largely gone to large timber holders. The agricultural land is generally in small patches, from an acre to a few acres. Little creek bottoms or level benches, what are called bench lands, are scattered all through (2726). The witness stated that he did not call to mind any quarter section that he thought a man could make a living on. He said: "I don't call to mind now any quarter section that the company has ever sold since I have been with them,

that a man has gone on to it and actually made a home and made a living on that quarter section." (2726-2727). Very few of the homesteaders are on the land at present. They stayed on the land long enough to get title to it and have abandoned it, and their improvements have gone to rack lots of times, and generally you might say they have no improvements left on them. The improvements in the beginning were just makeshifts, as a general thing. Occasionally one would find a claim with pretty fair improvements, maybe five or ten acres in a fair state of cultivation, but this is largely now grown up to brush. These lands in the timbered portions of the even sections thus homesteaded are now largely owned by large timber owners (2727.)

The Government produced a written statement of information received from this witness taken down at an interview with the Government's counsel, which it is claimed is to some extent inconsistent with his sworn testimony. This statement is Exhibit 122 (2742.)

A. W. Rees, who had been engaged in the sawmill business and timber business, or cruising timber, and who had charge of the Portland office of the railroad company, and was manager of the field work in Oregon, and a practical cruiser of timber lands (2801), after stating his knowledge respecting the unsold lands in the grant, and in the various counties, testified as follows: "Taking the entire grant over which he has examined in its present condition, he believes that not over four or five per cent of it is suitable for agriculture, and he thinks about seventy-five per cent of the total area of this land grant in its present condition, in his judgment,

would be classified as timber and chiefly valuable for timber only. He would say that about 20 per cent of this total grant in its present condition, in his judgment, would be classified as grazing, including old burns, where there is some soil and timber, but not suitable or valuable for timber; and including also lands that are rocky, barren or unfit for any useful purpose, and making three classes, timber, agricultural and grazing. He may have the timber estimate too high, he does not know, but that is approximately correct, he thinks, as nearly as he can tell. There are lands if the timber is cut off and cleared they could be used for agricultural purposes—lands that are level enough and soil good enough. From his knowledge of the grant such lands that could be thus cleared and grubbed and made available for plowing after the timber is removed, they would be classified as agricultural, would be a pretty small per cent, especially a small per cent that the value of the land would justify the cost of clearing. He has made some inquiries at different times about the cost of clearing and has cleared a little bit of land himself. There is a great deal of this land where it is heavily timbered that he does not think could be cleared for less than \$100 an acre. That is, cleared of stumps, and some of it much more than that. He presumes there are places where it might cost \$500 an acre to clear an acre of land, but he would place the general cost for clearing timber lands at from \$100 to \$150 an acre; it would be above \$100 an acre the average over the grant" (2815-2816.)

Exhibit 362, which classifies the land, is a compilation from other exhibits. They do not pretend to include or cover any cruising made prior to April 18, 1906. Exhibit 362 is substantially correct (2816). He had previously testified as to the method of classification as follows: "His instructions were to classify the land as timber, grazing or agricultural lands. The timber lands are lands chiefly valuable for the timber—the stand of merchantable timber thereon. Agricultural lands are lands of very little timber, and which could be plowed and cultivated in quarter sections or less, used for agricultural or orchard purposes, and that would yield a reasonable return on the investment. All other lands are classified as grazing lands, regardless of whether they have any value for grazing purposes or not. That is to say, if they were neither timbered or agricultural they would be classified as grazing" (2804.)

Mr. Lander (2845), supervising fire warden for the State of Oregon. Formerly engaged in the land business, testified his acquaintance with the lands in Douglas, Jackson, Josephine, Washington, Polk and Yamhill counties, considerable in Benton and some in Lane, Linn, Clackamas, Marion and Columbia. The witness produced reports made by him (Exhibit 350; 2854) and stated his acquaintance with the lands in various counties and then proceeded as follows (2849): "From his knowledge of the lands in Douglas County, and his acquaintance during the good many years that he has had charge of the fire patrol, he would say that without clearing the unsold lands of the company in Douglas County in their present state, there would be

very little, he does not know of any that could be utilized for agricultural, horticultural or farming purposes. Probably three or four per cent of these lands, if they were cleared, would be valuable or could be used for agricultural or grazing purposes in Douglas County. Some of these timber lands that are heavily timbered if they were cleared and grubbed might be used for grazing or some agricultural purpose. Some of the burns might be cleared—there are burns in these timber lands—for probably \$50 to \$75 an acre up to \$300 or \$400 an acre in heavy timber. The chief value of these unsold lands in Douglas County is for their timber” (2849). “A settler could not make a living on 160 acres at \$2.50 an acre. They would be just the same as on the even sections where they have dug out little homes there. The people are not there—they have sold out to timber companies. They are not living there as a general thing.” The witness further testified (2851):

“Q. Well, why do they not live on these lands?

A. Well, they wouldn’t be profitable to stay there. They couldn’t make a living on them.

Q. Then, if I understand you, these lands are chiefly valuable for the timber that is on them?

A. That is what I said a while ago.

Q. And they are not capable of actual settlement?

A. No.

Q. Now, you may state whether or not that same condition obtains as to all of the unsold lands of the Oregon and California Railroad Company

in the various counties where you have examined them?

A. The same condition prevails."

The witness further stated that when he came to Douglas County twenty-five years ago, these unsold timber lands of the company were not worth anything because there was too much timber on the land. Timber was not worth anything, and it cost too much to clear it. (2854.)

R. A. Booth, a large timber dealer, and a director in the Booth-Kelly Lumber Company, testified (D, 2577), that in 1880 the timber lands of the railroad company had no market value (2589). All the principal valleys of Western Oregon had been settled about 1898 in a general way. They were used mostly for agricultural and grazing purposes (2589). The first large claims were taken under the Donation Land Act, and subsequently under the Homestead, the Pre-emption law and Public Entry (2589). The timber lands in Josephine County were purchased earlier than those in the Willamette Valley (2590). Most of the pine was taken from granite lands. The soil has little value after the timber is removed (2591). On cross-examination, he stated that milling could not be done on any large scale on alternate sections. Even much later than 1880 settlers burned the timber in order to make settlements (2627). On re-direct examination he stated that the lands had about all been taken up on the even sections, either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along

Mill Creek (2633). The lands were chiefly valuable for timber, and the party holding the title disposed of them for that purpose. That is the case in all the lands we own, and that would apply to other lands in the grant of the same class (2634). It would not have been at all practicable to have sold these lands to these so-called actual settlers and required them to stay there (2634). The only industrial development that would have resulted from sale to actual settlers of these lands, would have been the vesting of the title ultimately in timber investors, and their consequent use in due time when they desired them to manufacture (2634-2635.)

A. C. Dixon (D. 2637), the manager of the Booth-Kelly Lumber Company (2637), in a statement made by him to a Committee of Congress (2658), said:

“Going back to the purpose of Congress in granting these lands, it was primarily that the road be built, and secondarily, that the country be developed as a result of this grant of land. We take the position that we have aided in the development of that section of the country to the fullest extent, and that in no other way could the lands have been used for the development except in the way we have used them. The reason for that is this: the land is heavily timbered, much of it on steep hill-sides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1,600 acres, nor any other number of acres, and made a living for himself and family. It would have been

practically impossible, and is today, with the better means of transportation and other facilities that we have now."

He further said:

"The fact that we purchased the lands for lumbering purposes is pretty good evidence that the land is not fit for actual settlers. As to the railroad grant itself, I have been over it pretty well a number of times, and out into the timber, and I think the actual percentage—anything that I might say would be a guess, but 20 per cent would be a pretty close guess—I think there might be 20 per cent of these lands that might be cultivated." (2683.)

Q. The Chairman: What area of them, if any, has been cultivated?

A. Mr. Dixon: Practically none. They are not susceptible of cultivation. Our idea has been to reforest them, and we have left the small timber standing for that purpose." (2685.)

A map of the lands cruised and examined by S. C. Bruce, and others, was introduced and marked Exhibit 342 (2825), and a compilation showing a list of the lands in their present condition, and when denuded, and where situated. This shows the total acreage 170,309 acres, and the present condition to be timber, 134,312; grazing, 27,133; agricultural, 8,864 acres. And when denuded, grazing, 132,669 acres, and agricultural 37,640 acres (2827). In making this estimate the lands having 100,000 feet and over were classified as timber

lands. Lands that were level enough to be tilled were classified as agricultural lands, and the other lands as grazing (2827). This applies to the lands in Marion, Polk, Benton, Lincoln, Lane, Linn, Coos and Josephine counties.

McLeod, one of the parties who assisted in the cruising and classification of the lands shown upon the map above referred to, testified that they made no classification of lands that were unfit for any purpose. They were classified as grazing lands (2834). This witness testified that a man could not make a living on 160 acres of this grazing land, confining his herd or his stock and its increase to 160 acres, and that as to the best timber land, it would not be possible to settle on the land and support a family by living on the land—making a home on it. He would have to sell the timber (2836-37.)

Eberlein testified (2277) that there were well on two hundred thousand acres absolutely barren rocky slopes, without any possibility of growth of any kind.

See also Kribs (2909.)

The lands in the grant beginning at the south are situated in the following counties:

Klamath, Jackson, Josephine, Curry, Coos, Douglas, Lane, Linn, Benton, Lincoln, Polk, Marion, Clackamas, Yamhill, Multnomah, Washington, Tillamook, Columbia and Clatsop.

Considerable testimony was given, specifically as to the lands in some of these counties, and particularly as to the unsold lands within the grant.

The southern tier of counties in which the grant is situated, bounded on the south by the California line are, beginning at the east: Klamath, Jackson, Josephine and Curry, the latter lying along the Pacific Coast.

The railroad runs in a southeasterly direction from Leland, in Josephine County, to Ashland, in Jackson County, and thence through the Siskiyou mountains to the boundary line.

The Rogue River rises in the Coast range in Josephine County, and runs eastwardly and southeastwardly.

We have grouped together the evidence of certain witnesses as to the character of the lands in particular counties.

Klamath and Lake Counties

In Klamath County there are 43,015 acres of unsold land in the railroad grant. The area of the county is 5,854 square miles, amounting to 3,746,560 acres. The population in 1900 was 3,970, being somewhat more than one person to two square miles. The number of families was 929, a little more than one family to six square miles.

Kimball, manager for the Forest Fire Association for Klamath and Lake counties for defendant (3164), testified that the lands in Klamath and Lake counties were chiefly valuable for timber. Not more than 1,000 acres would be suitable for agriculture (3167). If a settler bought 160 acres, he could graze sheep, but it would require from 200,000 to 250,000 acres for 2,000 sheep to graze on (3170). In the opinion of this wit-

ness, there is not a single piece of land where a settler could make a living out of the land (3171.)

Palmerlee, for Government, testified that in the vicinity of Swastika, in Klamath County, 80 per cent of the land could be cultivated (3927). In other parts about 25 per cent (3928). And in others 40 per cent (3928). The chief industry is stock raising, and the stock runs at large (3931).

Jackson County

The unsold railroad lands in this county amount to 441,791.15 acres. The area is 2,721 square miles, amounting to 1,741,440 acres. The population in 1870 was 4,778, and in 1900, 13,698. The number of families was 3,242—between one and two families to the square mile.

The Rogue River Valley is principally in this county, and there are a number of streams and creeks, particularly the Big Butte and Mill Creek. The Siskiyou mountains are in the southern portion.

As to the lands in Jackson County the witnesses for the defendants testified that they were rocky and covered with brush, and not suitable for agriculture, except in small tracts along the streams (Angell, 2768). A man would require 14,000 to 15,000 acres to pasture 3,000 or 4,000 sheep (Kribs, 2917). The timber is considered about the largest in the United States (2919.)

The witnesses for the Government differed very widely in their estimates of the agricultural character of the lands in this county. They vary in their estimate

from 35 per cent to 75 per cent as being a fair proportion of the lands suitable for agriculture (Randles, 3589-3594; Lamb, 3568; Houston, 3623; Kelsoe, 3649; Bailey, 3688; Beeman, 3947; McWilliams, 3914; Mahan, 4132.)

These estimates, however, were based upon the assumption that the timber had been removed, and the cost of clearing the land from stumps. Various witnesses stated the cost of clearing the timber lands at from \$50 to \$250 an acre.

The Government introduced as an exhibit (Exhibit 120, page 5526, Vol. XI.) a statement of Grieve, Assessor of Jackson County, who was very familiar with the lands owned by the railroad company in certain described townships, which he classified, and estimated the proportion of lands suitable for settlement purposes. His estimate varied from fifteen to fifty per cent, the average being about 35 per cent, of the quarter section which he thought was susceptible of cultivation, and he further stated that the quarter sections which he estimated as suitable for settlement would average about twenty acres of plow land to the quarter section.

The cross-examination of the Government's witnesses developed in almost every instance an interest adverse to the railroad company, either because the witness was an intervener or because he was an unsuccessful applicant for the lands under the Act of 1869 or an unsuccessful litigant against the company, and only in a few instances were any of the witnesses actual settlers.

Josephine County

In this county there are 167,480.98 acres of unsold railroad land (Whipple, D, 2934). The total area is 1,684 square miles, amounting to 1,077,760 acres. The population in 1870 was 1,204; in 1890, 4,878, and the number of families in 1890 was 1,736 or a little more than one to the square mile.

Witnesses for the railroad company all agree that the land is mostly mountainous and the soil too poor and too broken to be cultivated (2935). (Fallin, 3015-20; Angell, 2769; Stites, 2878.)

Whipple said (2936), that all the ground that is fit for cultivation has been settled years ago. The timber land when cleared is nearly all poor, rocky, shaley soil, not susceptible of agricultural use after it is cleared (2936.)

Fallin, Assessor of the county, says (3016), that the barren land is rough, rocky granite. Not over 5 per cent suitable for agricultural purposes. In many townships there are no settlers. There are thousands of acres in that county where there is no timber at all. They are bald hills, and there is no grass there except for a short time (3018.)

Josephine County is unsurveyed; about 20,000 acres are under cultivation, as shown by assessor's rolls. The Rogue River Valley is in this county, and the total population is about 9,000 or 10,000 (7254.)

Shank, real estate agent at Grants Pass, testified (2957), that most of the present occupied land was taken up under the Donation Act (2959), first the river bottoms and then the first and second benches, and then the hillside lands. About 16 per cent of the land is chiefly valuable for timber; 4 per cent to 5 per cent is capable of agricultural use. Not over $2\frac{1}{2}$ per cent is available for practical settlement (2960.)

Angell (2764), testified that the soil is poor—a great deal of granite soil, which is of no use.

The story told by the witnesses for the Government is not substantially different.

Martin (3308), says that from 15 per cent to 25 per cent of the land is susceptible of cultivation and would support a family after the timber was removed (3309.)

Kearns (3981), says that 50 per cent of the quarters could be occupied by settlers so as to enable them to make a living. He thought they could make a good living if they could get from five to ten acres that they could cultivate (3996.)

Sherman (4199), says that there was some land too rough to be cultivated (4202); 30 per cent to 35 per cent, in his estimate, was of that character. This witness went at considerable length into the subject of the cultivation of fruit, and the raising of poultry, and gave his views at large with regard to the possibilities of the county, which were almost wholly of a prophetic

character. As a summary he stated that in his judgment about 65 per cent of the railroad lands could be reduced to cultivation for the different purposes which he had mentioned (4222). It was quite apparent that he meant 65 per cent of the land after it had been cleared. He said that he knew that prior to 1903 the railroad company had offered these lands for a period of more than twenty years to anyone who would care to buy, in tracts of 160 acres, or less, on liberal terms at low prices, and on long installments, and that the lands remained unsold practically up to that time (4227). He testified that the lands in the Rogue River Valley had been largely taken under the Donation Act (4232). He estimated the timber in Josephine County at 9,000,000,000 square feet (4233). Upon cross-examination, it appeared that only a very inconsiderable quantity of grapes or fruits grow upon the hillsides at any distance from the valleys.

Miller (3727), also testified with regard to the character of the lands in this county.

A fair conclusion from the evidence of the witnesses respecting the land in this county, we think, is that of the 167,000 acres of land in the grant, not more than 5 per cent was naturally arable, the arable lands in the valleys having been taken up under the Donation and earlier settlement acts. In the western part of the county the land is heavily timbered. In the easterly part, there are many thousand acres of open lands, rocky and broken, known as the "bald hills." After the timber has been removed, not more than 50 per cent of the land

would be susceptible of cultivation, and until it has been removed not more than 5 per cent or 10 per cent is susceptible of cultivation.

Curry County

In Curry County there are 7,844.64 acres of unsold railroad land. The total area is 1,454 square miles, amounting to 930,560 acres. The population in 1870 was 504; in 1900 it was 1,709, or a little more than one to a square mile.

Curry County runs along the Pacific Coast and a large portion of it is now included in the Siskiyou National Forest. There are settlements along the ocean front, but the interior is mountainous and scarcely inhabited. The granted lands lie in Townships 34 and 35, Range 11, and Townships 31 and 35, Range 12, and Township 31, Range 13.

Coos County

There are 106,563.36 acres of railroad land unsold in this county. The total area is 1,578 square miles, amounting to 1,009,920 acres. The population in 1870 was 1,644, and in 1900, 8,874. The number of families was 2,204, being somewhat more than one to a square mile.

Coos County is heavily timbered (McCarthy, 3072). Steep mountain slopes, gulches and generally rough country. In the opinion of the only witness who gave a detailed description of the county, none of the land is fit for cultivation in its present state (3072). Its chief value is for timber, and it would not be practicable

to cut the timber off and cultivate it. If cut, 5 per cent would be level enough to plow. The elevation of the land is from 1,500 to 3,000 feet. Most of the land has been taken up under the Timber and Stone Act. The witness said that he did not know of any 160-acre tract that it would be practicable for a settler to go on and make a living.

McLeod (2842), testified that in his opinion the percentage of land valuable for agriculture is about 5 per cent.

Douglas County

In Douglas County there are 616,843.14 acres of railroad land unsold. The total area is 4,861 square miles, amounting to 3,111,040 acres. In 1870 the population was 6,066, and in 1900, 14,565; the families amounting to 3,165, or less than one to the square mile.

A map of the timber land belonging to the railroad company in this county was produced and marked Defendants' Exhibit 312 (2995). This map was prepared by defendants' witness, Zurcher, an abstracter of titles and a dealer in timber lands, residing at Roseburg. The map was verified by the personal inspection of the witness (2996). He testified that in its present condition there would be about 1/10 of 1 per cent of the land that was agricultural land. That if the timber were removed, from 15 per cent to 20 per cent would be available for agricultural or horticultural purposes (2997). He estimated that it would run all the way from \$100 to \$300 or \$400 an acre to cut the timber off and clear it (2997). This is what is known as first bench land,

and ordinarily the soil is best where the best timber grows (2998). The first settlements were along the creek bottoms, and the best soil was taken up under the Donation Entry laws. These were in the valleys (2998). Practically all such lands granted to the railroad company have been sold to settlers (2998). About 70 per cent of the railroad land has merchantable timber, and about 30 per cent of the land is practically worthless, rocky and unfit for cultivation of any kind (2999). A very considerable part of the timber land in this county has been taken up by large timber companies.

Gardner, for defendants, a surveyor and timber estimator, who has cruised 100,000 or 125,000 acres of timber land in Douglas County (3026), testified that the remaining lands of the railroad company would average probably 35,000 feet board measure per acre, and the chief value of such land is its timber (3028). In its present condition, less than 1 per cent of the land is available for agricultural purposes. Probably 25 per cent to 30 per cent could be farmed after the timber was removed (3029). The average cost of clearing the land would be from \$75 to \$100 per acre (3029). The majority of the lands are in the Cascade and Cascade foothills, and in the Coast range and Coast range foothills. The Umpqua River at Roseburg is 500 feet above the sea level and the land rises in points to 5,000 feet elevation. A large percentage of the grant would probably be at an elevation of 2,000 feet (3030). The lands along the Umpqua River were taken up under the Donation Act (3032). The even sections have passed into

the hands of timber companies, under the Timber and Stone Act, and under the Commutation Clause of the Homestead Act, and under the Northern Pacific Scrip (3032). Very few of the homestead entrymen have remained as residents (3033). In the main, the homestead claims have passed to timber companies (3034). A good deal of the land is used for grazing. The grazers graze their cattle through the timber land and through the railroad land, but the grazing will not support stock except for a small part of the year. In the opinion of the witness, he could not support a cow the year around upon a quarter section (3037). This witness was minutely cross-examined as to the railroad lands in the various townships in the county. His evidence is intelligent and very persuasive. His conclusion was that there is not one 160-acre parcel of the unsold land that a person could go on and make a living (3055). See statement p. 5523, Vol. XII.

Angell, for defendant (2764), who was a practical surveyor, and who, with others, was engaged in taking the photographs which were introduced in evidence, testified with regard to the lands in Douglas County—that the lands were very mountainous and covered with heavy timber or undergrowth, and with the exception of isolated tracts on creek bottoms or streams, are not suitable for agricultural purposes. Chiefly valuable for its timber and there are portions that are suitable for grazing, but not to any great extent back in the mountains.

Stites (2878), a timber cruiser, testified as to the timber lands in Douglas County, which he had cruised.

He did not think there was any possibility that any of the land could be used for agricultural or horticultural purposes (2881). He testified that as to the unsold lands he did not think that a man would be justified in undertaking to settle upon them and inclose a quarter section and make a living for himself and his family on that quarter section; if he confined his stock range or horticultural productions to that section (2884). He gives as his opinion that if the timber lands had been sold in quantities not exceeding 160 acres, and at a price not exceeding \$2.50 per acre, the purchasers would sell at the first opportunity (2885.)

There was considerable conflict of opinion between the witnesses for the Government as to the relative proportion of agricultural land in this county. (Martin, 3300; Creason, 3338; Tipton, 3409; Boyle, 3519; Bogard, 3659; Shields, 3681; Taylor, 3718; Neuner, 3731; Miller, 3747; Jackson, 4099; Spiker, 4176.) None of these witnesses had actually cruised the county and actually inspected the railroad lands in this county, professionally, or for any other purpose. Taylor, who had been a farmer, and who is now a locator, thought that if the timber were removed 50 per cent of the land would be suitable for cultivation. He thought that $\frac{1}{3}$ of the land could be cultivated and made homes of (3720). It appeared on cross-examination that he has located probably 150 timber claims, mostly under the Timber and Stone Act, and a few under the Homestead Act. The timber first began to be considered as an object

of value about ten years ago (3720). And he testified that the timber sections ran from 3,000,000 to 10,000,000 feet. He said that he meant to say that the lands could be made farm lands after the timber had been cleared off and the stumps grubbed up (3721.)

Keller, who was a farmer and laborer, thought that 66 $\frac{2}{3}$ per cent could be cultivated after the timber or brush had been removed (3723). Neuner (3731), a farmer on bench land in the Umpqua Valley, testified that the lands he was acquainted with about 70 per cent would be fit for agriculture, and 25 per cent to 30 per cent for cultivation (3733). He was also a timber locator. Located people from the cities and from the East. They took up lands under the Timber and Stone Act, but not much under the Homestead law. They averaged 3,000,000 feet an acre; 6,000,000 would be considered the best. The stumpage is worth 50 cents (3737). He knows of two men who remained and are farming (3747). The people who came in there were speculators purely. They came solely for timber (3736-7) and not to settle.

Miller (3747), who had also been a locator and an applicant for railroad land, testified as to his acquaintance with certain townships in Douglas County, and thought that 30 per cent to 35 per cent of the land could be made suitable for cultivation (3748). Taking the lands generally, 30 per cent would be about right. The witness thought that this average would hold good as to each tract, although there might be sections that contained no plow land, while other places it might be almost

all tillable land (3748). Most of the settlers are on streams or headwaters (3755.)

Jackson (4099), a lawyer, residing at Roseburg, testified that practically all the Government lands had been settled upon or taken. That 75 per cent to 80 per cent of the railroad lands, in his opinion, would some day be taken for cultivation (4104). The witness said: "The settler does not have to have 160 acres of plow land in order to maintain himself and his family. He knows people there who are making a good living where they do not have more than three or four acres of plow land cleared, and using four or five acres, will produce some hay for their horses and cows, and they have their chickens and a few head of stock ranging in the mountains. None of it is fenced in there. The Oregon laws do not require them to keep stock on their own land and they let them run at large, and everybody gets the benefit of all the out country, and they all use it." He testified that on account of the general lay of the country, there being hills and valleys everywhere, there is hardly a quarter section but what some portion of it will extend down to the leveler portions and furnish sufficient level land to build a home. Some portions have cliffs and rock which would prevent its use for almost any purpose except mineral. These portions would not be suitable for agriculture, but stock range on them (4105). As to the timber lands, a settler might market a portion of the timber; the remainder he would have to burn up

(4108). This witness has been engaged in several political and legal controversies with the railroad company and showed a certain amount of bias.

Spiker, a young man whose father managed a ranch at Oakland, testified that 50 per cent of the land that he had testified about would be tillable if it were cleared (4181). He was also an applicant for railroad land—timber land (4185.)

Lane County

The unsold railroad lands in this county amount to 299,606 acres. The total area is 4,380 square miles, amounting to 2,803,200 acres. The population in 1870 was 6,426; in 1900, 19,604, and the number of families 4,473, or a little more than one to a square mile.

According to Hunt (3138), who was a civil engineer, and who is familiar with the land, a witness for defendants, 15 per cent could be used for agriculture. This land is chiefly valuable for timber. A forty where you come down to a stream or creek, there would be a few acres out of the forty that would be valuable for agriculture if it were cleared, but the majority of the unsold lands are farther back in the county. The settlement of the country has taken up all the lands that would be suitable for agriculture. And the lands that are left are rough and mountainous—covered with timber—so that it would be very poor for agricultural purposes (3140). For grazing purposes there would be a greater percentage than for agricultural purposes. If it were logged and burned over and seeded, there would be available for grazing for some four months 60 per cent

or 70 per cent (3141). It would cost all the way from \$100 to \$150 an acre to clear the land (3141). The average timber for the county would be in the neighborhood of 1,000,000 feet to a forty. It would be worth \$4,000 for the quarter section; the best timber would be worth twice that (3142). If a man should take one of these timbered quarter sections, he could not make use of it as a home. The value would be in the timber (3143). The even sections were taken up under the Homestead law, but within the last ten years, they have been taken under the Timber and Stone Act. In nearly every case it was sold to some timber company. A man could not take a quarter section and use it successfully for grazing purposes and make a living on it if he were confined to his quarter section. In order to do grazing, the man would have his headquarters on the quarter section and graze on the common (3144). In the western part of Lane County, most of the settlers have sold their lands and moved out. Their buildings are there yet. The timber men have bought the land for the timber (3160). There is not a commercial vineyard in Lane County (3163.)

According to the witness, Bruce, not over 6 per cent or 7 per cent of the lands in Lane County are valuable for agricultural purposes (2825.)

According to the witness, Angell, the land tributary to the MacKenzie River is chiefly valuable for timber. The burned-over land, if denuded of brush, would be suitable for grazing, but the cost is prohibitive (2770.)

For the Government several witnesses testified as to the land in Lane County.

According to the witness, Kebelbeck, the land will be valuable for farming (3245). Has land near Cottage Grove which he bought fourteen years ago (3250). He says he never found a section outside the high mountain that four families could not make a living on, but for his estimate of living see 3246. He was an applicant for railroad land (3250.)

Lawrence says he is familiar with four townships as the Deputy Assessor, and has hunted over two other townships; testified that these lands could be used for agricultural or horticultural purposes (3259). He says that in that territory there is not a single quarter section that would not support a family, except one (3259). He applied to purchase a quarter section which was covered with very good timber, and says that if he were a younger man he might be willing to take it without the timber (3260). The section he applied for would be worth \$3,000 for the timber (3261). He would have been glad to buy it for \$2.50 an acre, because it was worth \$3,000 (3266). The witness thought the land could be cleared for \$50 an acre (3273). The testimony of this witness is interesting as disclosing the extent of cultivation and residence he thought sufficient to secure a homestead. The ground which he planted and cultivated was about ten feet by fifteen (3284.)

Whitford, a cruiser by occupation, testified that if the lands were cleared, 50 per cent would be good for farming, and the remainder for grazing (3295.)

Hilleman, who is a rancher, made substantially the same estimate (3370). He owned 120 acres, of which

four were cultivated, but ranges over railroad land (3374.)

Currin, Government Surveyor, also County Surveyor, estimated that 30 per cent or 40 per cent of the land could be used for agriculture (3390). The rest might be used for grazing or orchards. Some is very steep and rocky and would not be practicable for any other purpose than forest (3390). In making this estimate he included as agricultural lands, lands which when cleared would be sufficiently level to put to agricultural use. A good deal of the land classified as agricultural is covered with the heaviest timber in Lane County (3395). The largest fir trees rise to a height of 200 feet and range from six feet to ten feet at the butt (3395). He testified that the timber was now an asset when formerly it was an expense to the settler (3407). The people who settled and remained on the sides of the mountain had outside range of other lands (3408.)

Pengra, stock ranger, says that of the land in the Mohawk country, perhaps 50 per cent is suitable for cultivation when the timber and brush is off (3445). The balance is suitable for grazing. Stockmen range their cattle in the mountains. His estimate is on the general territory and not merely on railroad lands (3448.)

Caldwell, who testified that he had had a homestead, but had abandoned it, said that a settler could make a living on almost any quarter in the vicinity, which he knows best by creeks and towns (3503).

Deadmond testified that 40 per cent of each 160-acre tract could be cultivated. He runs a rooming house in Springfield, and formerly did work as a contracting logger. Purchased timber land from the railroad company (3775). Cleared about eight acres—made a pasture of it (3776). He sold it. Claimed to be familiar with portions of the county, having hunted over it, and said that in determining the percentage which could be rendered suitable for cultivation, that would depend upon the purpose for which a man wanted it. The timber would have to be removed. It was a timbered country, but part of it has been burned over. West of the meridian line, one-half would be good for agricultural purposes after the timber was removed (3773). On the east side of the meridian it would not be quite so much—probably one-third. In some places he thought nothing could be raised (3774). He sold the timber on the railroad land he bought amounting to about 2,000,000 feet (3776). This witness describes the use made of the Homestead laws. He said the homesteader would buy a little shack and go out to it two or three times in the six months until the fourteen months had expired, and then he would commute and pay \$2.50 an acre, or else he would stay the five years. If they commuted, generally you would not see them any more. I call them speculators. Some of them were working for the timber companies (3780). Some of them proved up and some of them are still living on the land (3782.)

Withrow farmed some bottom land near the MacKenzie River (3800). Testified that he was acquainted with the lands along the MacKenzie River. He was a

fire warden for four months in the year for seven years in the MacKenzie River territory. As you come down the river, the land would grow about 50 per cent suitable for agricultural purposes. On the south side of the river it is broken. There are good little patches in there, but hard to get at (3822). In the north, if divided into 160-acre tracts, it would average about 50 per cent plow land, but not in one township. The railroad quarter sections—the best ones are worth \$5,000 (3808). Over townships that he beat through the timber would average 3,000,000 (3808). The rush for the timber lands began in 1894 and continued up to 1908. There was a good deal of activity in 1906. People rushed in from Salem, Albany and Eugene and went through the form of complying with the Homestead law where they did not take it under the Timber and Stone Act (3812). They kept their business in town until they finally commuted. That is the way they got a good deal of the timber. That was the custom of the country at that time (3813). He cleared about three acres on his homestead (3810.)

Kinman, a rancher, bought 80 acres and sold off the timber. Applied to buy some railroad land and got no answer. Township 15, Range 1 West, and some other sections which he described between the Mohawk and Calapooia rivers, if cleared off—half the land could be used for farming (3817). Paid \$960 for his land and it is worth, in his judgment, \$3,500 (3820). The land would be worth more for farming if the timber were off (3820). As an illustration of the value of the land for agricultural purposes, Kinman testified that the land that he wanted to buy at \$2.50 per acre had timber

which was worth \$50 an acre. The stumpage would be worth about 50 cents. But it would take \$50 an acre to take out the stumps, so that the land would be more valuable without the timber than with it for agricultural purposes. A profit could be made by selling the stumpage and abandoning the land (3823.)

Collier, a civil engineer and County Surveyor for Lane County, and Government Surveyor of certain townships in that County, testified that taking Lane County from its northern and southern boundaries and within the limits of the grant, approximately 75 per cent of the land would be suitable for settlement. Fifty per cent of said area is agricultural in character, and 50 per cent thereof grazing. A considerable portion of this area is timber or brush land, which would have to be removed before the agricultural lands can be utilized for agricultural purposes (4262.)

See also Renne (3449-3450.)

Linn County

The unsold railroad lands in Linn County consist of 61,966.23 acres. The total area is 4,380 square miles, amounting to 2,803,200 acres. The population in 1870 was 8,717; in 1900, 27,713, and the number of families 4,258, or a little less than one to a square mile.

Angell for defendant testified that the chief characteristic of the land in this county was its timber. The agricultural tracts are isolated and separated from one another. They lie chiefly along the streams. There are certain level patches of land on the divides that might be

adapted to agriculture, but there is no body of land of any considerable size (2770.)

Brenner, for the Government, who is a farmer at Scio, testified that 90 per cent of the land in these townships is susceptible of cultivation, but he went on to say some quarters are practically level—others are rocky; some of it is too rough, and the rest—part of it would be, say—a rocky cliff on it—and the rest of it you might say practically level or in canyon-shape like. The witness said it would take a good big piece for him to make a living; some people would make a living on a small tract (3636). Some of the land cannot be cultivated at all where the rocks are—but there is some good timber on it (3638.)

Carlson for government took a homestead in Township 15, Range 3 East. After the timber and brush has been removed, he thought that 80 per cent of the land would be suitable for ploughing and raising crops (3760). On cross-examination he testified that there might be 3,000,000 feet of timber on his homestead (3761). He had four acres under cultivation (3758). The land is situated on the river bottoms on the Calapooia River (3761). A man might clear a quarter section of land alone but he might be thirty or forty years in doing it (3763). He knew of two settlers in the timber lands both of whom are now dead (3763). The people who are farming there now are on lands which have been cleared, and they first settled on the streams and got creek bottoms and river bottoms, and what little clear land there was. Some of them took donation lands (3765).

Mariels testified that he knew of but one or two 160-acre tracts in certain townships that a family could not go on and make a living (3839). But on cross examination it appeared that he had never homesteaded any land, and lived on land his father had homesteaded, who died in 1888 (3836). His father had about six acres under cultivation. The witness and his two brothers had tried to buy railroad lands in 1908 carrying about three million feet to each quarter section (3845-3849). He testified to what he claimed to have been an attempt to make a homestead, but what was apparently only an effort to get a valuable timber quarter without compliance with the law (3849-3855), and he was certainly not a reliable witness.

Shelton (4053) thought that 75 per cent of the entire lands, including the railroad lands, could be cultivated after it is cleared. That percentage would not hold on each 160 acre-tract (4055). Some of it is rocky, and steep, and could not be cultivated, but could be used for grazing.

Young (4060) testified that between Crabtree and Thomas Creek he thought that sixty-five to seventy-five per cent of the land would be suitable for cultivation.

Wilson (3934) testified that half the land is susceptible of cultivation and that the average of fifty per cent would apply to each 160-acre tract.

According to Stewart, County Clerk and County Judge, 30 or 40 per cent could be cultivated if the timber were taken off. It costs from \$150 to \$200 per acre to clear. It is chiefly valuable for timber. The agricul-

tural lands were taken up before the grant was made (3007). It does not pay to clear land in order to cultivate it; life is too short for that (3012). He also testified that he knew of quite a number of settlers who, as soon as they acquired their title, sold it to some of these timber land syndicates. Its value was in the timber, and not in the land (3015).

Polk County

In Polk County there are 37,017.79 acres of railroad land unsold. The total land area of this County is 701 square miles, or 448,640 acres. The population in 1870 was 4,701, and in 1900, 9,923.

This County is situated west of Marion County. The railroad line runs through the Willamette Valley at the east of the County. The townships in 6, 7, 8 and 9, Range 6, 7 and 8 West, are in the Coast Range of mountains. The elevation is from 1,000 to 3,500 feet. It is well timbered.

According to the witness Fuller, for defendants, who is in the timber business, the value lay wholly in the timber. Not 10 per cent could be used for agricultural or horticultural purposes (3128) in the main for the reason that the elevation is too great for farm products or fruit to grow successfully. Probably 30 per cent could be used for grazing (3129). It would cost from \$75 to \$100 an acre to clear the land. He said, I have known a good many people who have undertaken to make a living up in those hills, cleared little patches of land at different times, and I know at this time you cannot find any of them living there. They don't

seem to be able to make a living. The witness said that he knew practically every forty acres of land in Polk County; that the land owned by the timber companies was mostly taken under the T. & S. Act (3129-30) and the Homestead entries are exactly in the same condition as the T. & S. entries. The timber companies when buying did not pay any more or any less for a homestead entry than for a T. & S. entry, except where the homesteader had cut off timber, and that was deducted from the value of the land. The homestead cabins that were put up there are not occupied (3131). The witness gave his cruisings and estimates of the amount of timber on the sections in the western part of the County (3134, et seq.).

Angell (2771) testified that the lands were chiefly valuable for timber. A portion burned over which is of very little use without a great deal of expense.

Clackamas County

In Clackamas County there are 89,162.07 acres of railroad land unsold. The total area of this County is 1,861 square miles, or 1,191,040 acres.

In 1900 the total population was 19,658, comprising 4,392 families, or about two families to the square mile. In 1870 the population was 5,993. This County lies directly south of Multnomah, in which Portland is situated. Oregon City is the principal town and has a population of 5,000.

The Willamette River runs through the western portion of the County with several important branches,

such as the Clackamas River. The eastern part of the County has been set off for forest reserve.

Exhibit 353 shows the classification of lands which have been cruised (7345). These lands show a larger proportion of agricultural lands in the grant than in any other County, because the cruising was done along the Clackamas River where they include the bottom lands along the river.

Nelson, for defendant, who was the County Assessor from 1902 to 1909, and before that Deputy Assessor (3099) says that the railroad lands lie in the southeastern part of the County. Nearly all the lands are in the Cascade Range (3099). The majority of the land is timbered, or land that is worthless. The majority of it is up in the Cascade Mountains (3099). A very little of this land is down in the valley where it could be put into agriculture. It is not bought very generally; most of it is up in the mountains where it would be beyond the settlements. In the opinion of this witness, not over 4 per cent would be good for agricultural purposes (3100). About 20 per cent would be fit for grazing purposes. A settler could not make a living by grazing his stock upon one quarter section (3101). About 30 per cent of the land has been burned over in the southern part in Townships 6 and 7, 2 and 3 East. In the opinion of this witness, very little of the land would be valuable for agriculture after the timber was removed, because it is too far back in the mountains (3102). A good deal of the soil is rocky. More than half

is up in the mountains. It is cut up with canyons. Wherever the creeks come are canyons—and deep canyons. The timber grows right on the sides of the canyons. There is hardly any level land to amount to anything between the canyons. The little creeks make deep canyons up there and the Molalla and the Clackamas and all these creeks have all deep canyons (3104). It costs from \$75 to \$100 to clear the land of stumps.

McLeod, a cruiser for the Railroad Company, cruised 65,681 acres, part of which was in Clackamas County. The lands in Clackamas County are classified as 16,358 acres of timber land; 31,297 acres of grazing land in the state of nature, and 4,238 acres of agricultural land. He said that some that is classified as grazing, could not be made grazing under any conditions, because it is too steep and stony; in fact, some of it is mountains of rock (2834-5). In order to make it fit for grazing, the land must be cleared. It would cost anywhere from \$75 to \$500 an acre. In his opinion, a person could not settle on the timber land and make a living on it (2835). He would have to sell the timber. The witness testified that of the 65,681 acres cruised by him, 12.44 per cent was more valuable for agricultural purposes than for other purposes after being denuded of the timber (1536). He did not attempt to separate the worthless lands. They are included in the lands classified as grazing (2837).

Angell testified that the unsold lands in the grant are timbered lands with the exception of portions that are scattered and burned, but the chief value of the lands

belonging to the Company that he had examined, was its timber (2772).

The Government witnesses place a much higher estimate upon the proportion of lands that could be cultivated. Standinger, who lived in Township 5, Range 3 East, testified that in the four townships—4 and 5 South, and 2 and 3 East, most any tract of 160 acres would support a family (3468). That 25 per cent of the quarter sections would be plough land.

Dix, whose father took a homestead in Section 34, 4 South, 3 East, testified that the lands in this neighborhood were generally capable of settlement. His land is situated on Mill Creek (3508).

Kandle lives at Springwater on an old Donation claim. He testified that lands south and east of Springwater had been burned over, and the majority of it would be called "deadening" covered with more or less dead timber. A certain portion of it could be farmed. If you run ten miles southeast of Springwater, you will get into the foot of the mountains. Of course, that is rough, rocky and hilly. It is not good for anything, only some pasture land—but as far as eight miles back, southeast, there are settlers. The settlements extend up to the foot of the mountains and up the Clackamas River (3554).

Marion County

The unsold railroad lands in this County are 30,256 acres. The land area is 170 square miles, or 748,000 acres. The population in 1890 was 27,713. The County is situated southwest of Clackamas County. The

Willamette River constitutes its western boundary. Salem is the principal city with a population in 1900 of 4,250. A considerable portion of the land in the western part of this County is in the Willamette Valley. Of the railroad land, according to the witness McLeod, about 7 per cent are valuable for agriculture (2842).

The Government appears to have called no witness to testify as to the railroad lands in this County.

Yamhill County

In the East Side Grant there are 27,120.21 acres unsold, and in the West Side Grant 1,563.11. The population in 1890 was 10,692 and the number of families was 3,130.

Yamhill County lies between Washington County on the north and Polk County on the south. The principal town is McMinnville, with a population of 2,000. The Willamette River runs along the western boundary for a part of the way.

Booth, for defendant, testified that he has a knowledge of the country within a circle of six miles. The railroad lands not covered with timber have been burned over (2969). It would cost from \$100 to \$125 an acre to clear it. In his opinion 25 per cent of it could be cultivated if cleared (2970). The land on the higher points where the snow falls six feet in the winter is not practicable for agricultural purposes (2970). All the agricultural lands on the Willamina Creek were taken up under the Donation Law long ago (2972).

Jones, for defendant, who is now County Clerk of

Yamhill County, residing at McMinnville, testified to his knowledge of the country in Townships 2 and 3, 6 West. He says the country is very abrupt; cut into deep ravines and gulches; with the exception of isolated tracts, it is not agricultural (2990). Not 5 per cent could be used for agriculture. Most of the lands taken up by homesteaders have been abandoned after the timber was taken off (2992, 3).

Angell, for defendant, testifies that the railroad land in this County has a good stand of commercial timber, and in places there are burns (2772).

Maloney, for the Government, testified that he had been over the land south of Sheridan and Willamina, Townships 4 and 5, South. He stated that in his opinion this land is too high to be very profitable for agriculture (4038). It is high and mountainous and valuable principally for stock. Township 4 South, 6 and 7, 40 per cent to 50 per cent could be considered as agricultural (4039). The altitude is something like 2000 feet (4040): the lower levels are adapted for fruit raising. He says he presumes they could raise grain, but has never seen it (4040). The higher mountains are coarse shot land (4040) without much timber. It is burned over, and the timber is small. In 4 South, Range 6, and Range 7, there are only a few of the quarters but what would have from 5 per cent to 25 per cent of the land that could be cultivated. As to these higher sections, he says that a man could not make a living on the land he could cultivate unless he had stock to utilize the grazing (4045).

On cross examination the Government introduced under objection a statement purporting to have been verified before a special agent of the Government (4049) in which it is stated that 90 per cent of the quarter sections have at least 10 acres of tillable land.

Columbia County

There are 17,678.83 acres of unsold railroad land in this County. The West Side Grant is in Columbia, Tillamook, Washington, Multnomah and Yamhill Counties. The land area is 677 square miles, or 433,280 acres, with a population of 6,237, and 1,426 families. The country is generally rough, broken and heavily timbered.

Scott, for defendant, testified that a great deal of the land is rocky and unfit for cultivation. In many cases the altitude is quite high. The soil is generally coarse mountain land, very unproductive, and in order to clear this land for cultivation, it would require from \$100 to \$200 an acre (2979). The lands in Columbia County through which he passed and with which he is acquainted are generally heavily timbered. He would not say there was over 15 or 20 per cent of these lands that would be available for any agricultural purpose with the timber removed, and without the timber removed there would not be any (2970). Here and there throughout the grant in the low little valleys and ravines and draws leading down into the larger streams, there is here and there a spot where a house could be built, where a settlement could be made, but the balance would not

be good for anything. A man would starve to death on a settlement like that (2980-2987).

Angell testified that in Columbia County the lands are heavily timbered. That the commercial value is for timber only (2773), usually worth from \$5,000 to \$20,000 a quarter section. The stumpage is about \$1.00 a thousand. If the Company had sold these lands to so-called actual settlers, the only use they could have made of them would be to sell the lumber (2774). He states his experience has been that lands taken in quarter sections under homesteads, or purchased in timber areas, are never occupied for any appreciable period after the title has been acquired. I have never known a half dozen instances of such occupation (2774). He says that it would be impossible to make a living on the lands by agriculture, except in some isolated cases (2775). A settler could not make a living by grazing, except by pasturing on outlying lands (2776). He said,—I do not think there is a quarter section in the grant, in the burned region, that a settler could make a living on by pasturing on that section (2776). One reason is that the lands are in high altitudes; considerable snow falls there. It would be necessary to raise hay to winter stock, or else take them to some other place (2776).

Anderson, for the Government, who lives at Scappoose, not a homesteader, said that in his opinion, after the timber is taken off, 50 per cent could be put under the plough. The railroad lands are back in the foothills and on the mountains. He had applied for railroad land in 1907 (3862).

Grant lives in the southern part of Columbia County and knows adjoining property for about three or four miles around. He said that about 50 per cent is tillable land; 45 per cent pasturage and 5 per cent worthless. But says that he cannot distinguish the railroad lands from other lands (3868).

Quick, for the Government, stated that in his opinion 70 to 80 per cent of the lands in the townships with which he is acquainted, speaking of the land generally, including railroad land, could be used for agricultural purposes when the timber is removed (3480). Stumpage in that county is worth two dollars a thousand (3488). He adds:

“Now, suppose that these Lafferty people, who have attempted to buy this land from the railroad company or made application to buy it, at \$2.50 an acre, should get a deed from the railroad company and a good title at \$2.50 an acre, what would they be able to do with the best quarter sections of timber that is situated in that group of claims or quarter sections that these clients of Mr. Lafferty have applied for? What would they be able to do with that quarter section—what could they sell it for?

“A. Well, if it was accessible to any of these railroads they could sell it for possibly two dollars a thousand.

“Q. What would be the stumpage—I mean, what would be the quantity of merchantable logging timber that the best quarter section of this land

would carry—about how many million feet board measure?

“A. Well, I think there is tracts out there in that section of the country that will go six million to the quarter section. That is an exceptionally good one, though.

“Q. What would they average, the timber lands?

“A. Well, take it all the way through, they would average probably three million.”

Benton County

In Benton County there are 53,626.99 acres of railroad lands unsold. The total area is 677 square miles, or 433,280 acres, with a population of 6,706 in 1890.

The Willamette River runs along the eastern boundary. Corvallis is the principal town, having a population

According to Vitido, a witness for defendant, an assessor, the land is chiefly valuable for timber (3060). There is much burned land. Some of the unsold lands could be utilized for grazing. There is no land in the southwestern townships that anybody could make a living on (3061). There is nobody living in Range 13 South, 8 West; there is no inhabitant in the township, either on the even or odd sections (3062).

Gray, who patrolled the lands for the fire patrol, says that three-fourths is covered with fir timber. Its chief value is the timber. Not 15 per cent would be suitable for agricultural or horticultural or any useful purpose other than timber (3120).

Warfield, for the Government, testified that the railroad sections were as suitable for settlement as the homesteads taken up, except right along the Alsea (4157). In Township 13, Section 8, not very much can be cultivated (4158). The altitude is 3,000 feet. If a man had 160 acres and there were three cleared, he would call that a farm (4175). Twenty years ago there was no demand for the land (4171). The land in the mountains or in the timber or in the foothills was practically unsought until 1890 (4172).

Lincoln County

The railroad lands unsold in this County comprise 15,906 acres. The total land area is 1,008 square miles, or 645,120 acres. The population is 3,575, the number of families 909—less than one family to a square mile.

Lincoln County lies along the Pacific Coast, west of Polk and Benton—of which it was formerly a part. A railroad runs from Corvallis in Benton County across the mountains along the Valley of the Yaquina.

According to the testimony of the witness Vidito, for defendant, there is no land available for agricultural purposes in this County. Vidito, who for several years ran sawmills in the Coast Range, testified that he did not know of any of the lands within the grant that would be available for agricultural purposes (3064). A settler could not make a living upon 160 acres, either by pasturing stock or any other useful avocation relating to agriculture or horticulture. He says: "I never have advised anybody in years past, or in the last ten or fifteen years, to take a homestead. I knew where

there was vacant Government land, but I would not recommend anybody to take it." (3065.) There is nobody living on the homesteads that were sold to timber syndicates. He said they cleared up five or six, and some of them ten acres. That is, they cut off the timber and sowed grass and burned up part of the logs, and they had timber enough on their claims so they sold out at a good figure and just simply left—vacated—and timber owners own it now.

Ball (D) who resided at Toledo in Lincoln County and assessor of the County for five years, testified that Lincoln County was set off in 1893. He says that outside of the timber, there were perhaps six or seven thousand acres, portions of which are good for pasture. About 15 per cent could be used for fruit or for agriculture. These are small patches, small benches and small bottoms on creeks scattered pretty generally through this tract of land. There are about 3,000 acres that are better than the hills just described. It is a little leveler in character. This is scattered through the remaining region. It is nearer the settlements—nearer the roads. Perhaps 30 per cent of this could be utilized for agricultural purposes (3230, 3231). The balance is chiefly valuable for its timber. About 1,500 to 2,000 acres, after it is cleared, would be valuable for agricultural or horticultural use—in tracts ranging from perhaps five to fifty acres in a place.

The Government called no witness in rebuttal.

In *Klamath and Jackson* Counties, there are 441,-791.15 acres unsold.

Grieve (3199) a witness for the Railroad Company, testified that 190,000 to 192,000 acres are worthless (3201), as far as farming is concerned; and that the chief value of the remaining 251,000 acres is timber. In some districts the timber runs 20,000 square feet to the acre (3203). In the opinion of this witness, if the timber were cut, 12 per cent of the land could be used for agriculture (3204).

From this review of the evidence respecting the character of the granted lands, we summarize the conclusions of fact which should, as we think, be derived therefrom.

- (1) **At the time of the passage of the Act of 1869, the greater part of the arable land within the limits of the grant had passed from the ownership of the Government, and was not available for the purposes of the grant.**

This fact is made evident to the eye by the colored map, Exhibit 264. The witnesses for the Government and for the defendants testify with unanimity that the agricultural lands in the Willamette Valley and in the Valleys of the Umpqua and Rogue Rivers, were largely taken up previous to 1869 under the Donation Law and early settlement laws. There was very little land in western Oregon which was arable in its natural condition. This land was situated along the rivers and creeks and was taken up by the first settlers. It was only after these lands had been taken up that settlements extended

to the bench lands upon the hillsides. It is necessary to keep this fact in mind in reading the evidence of the witnesses for the Government, most of whom reside in the valleys and whose personal acquaintance with the land within the grant is for the most part limited to their own localities, and who frequently testify as to the agricultural character of the land on the assumption that it has been cleared without expressly so stating.

- (2) The greater part of the granted lands were heavily timbered. These lands were incapable of settlement and cultivation while the timber was upon them. At the time the grant was made, and for many years thereafter, the timber was without value. The expense of cutting the timber and clearing the land was prohibitive of its use for actual settlement, even though the land itself, after being cleared, should be found to be susceptible of settlement and cultivation.
- (3) A large proportion of the granted lands in their natural state, and a large proportion of the timber land when cleared, was mountainous, broken and sterile, and for that reason incapable of settlement and cultivation.

In support of these three conclusions of fact we refer to the evidence which has already been reviewed.

- (4) Of the granted lands 163,431.28 acres were sold by the Oregon and California Railroad Company prior to May 12, 1887. Nearly all of the said sold lands were sold to actual settlers in small quantities,

although in a few instances such sales were made in quantities exceeding 160 acres to one person, and at prices slightly in excess of \$2.50 an acre. These lands were capable of settlement and cultivation, but when they had been disposed of, the remaining lands with some exceptions, were either incapable of settlement and cultivation, or were chiefly valuable for timber.

The first part of this finding is taken from the stipulation as to the facts by the parties, Item 8, (E). The last sentence rests upon the evidence to which attention has already been called. See also Defendant's Exhibit 279, 280, advertisements published in 1871, 1872 (pp. 6776-9).

- (5) When by reason of the construction of the railroad and the increase of population, the remaining lands became salable, they were chiefly valuable for timber, and substantially the only persons who sought to acquire them did so to secure the timber, and not for the purpose of actual settlement. It never has been possible to sell such lands for purposes of settlement and cultivation, except in rare instances.

It is stipulated between the parties, subdivision XII, item 1, as follows:

"Until about the year 1890 or 1891, there was substantially no demand for said granted land, except for the purpose of settlement, or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding \$2.50 per acre."

“Item 2. During a large part of the time prior to the year 1894, the defendant Oregon and California Railroad Company maintained an immigration bureau engaged in inducing immigration and settlement upon said land, and the greater part of the sales of land to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding \$2.50 per acre, were made after the year 1894.”

The evidence is to the effect that the timber lands in Oregon became valuable about 1894, and from that time there was an increasing demand for them at prices in excess of \$2.50 an acre. Large timber companies bought up the land, established mills and created the lumber industry. The timber lands then acquired value for the immediate mercantile product which was upon them, and for which there was a market. This created a demand for the timber lands, not for the purposes of occupation and cultivation, but in order to secure the immediate profit in the sale of the timber. The result was that lands could not be sold except in rare instances to actual settlers. (McAllister, 2014-5.)

Mr. McAllister testified in substance:

One could not today sell those lands that we are speaking of for agricultural purposes. Nobody would buy them for that purpose. I refer generally to the lands in this suit. When the land is principally valuable for timber, it is safe to assume that a purchaser offers to buy it for the timber. (2014.)

Mr. Angell testified:

“My experience has been in surveying in the timbered areas of this state as well as other states that lands acquired by homestead from the Government on the timbered areas are never occupied for any appreciable period after title has been acquired. I suppose that in all the lands I have surveyed and that I have been connected with since 1892 there were not half a dozen that were acquired either by homestead or purchase that the parties lived in after they secured their title.” (2774)

The whole body of the evidence submitted for the plaintiff and for the defendants corroborates these statements.

- (6) To a considerable extent the timbered lands within the grant, if denuded of the timber, are not susceptible of settlement and cultivation.

There is a considerable difference of opinion between the various witnesses as to the proportion of the timber lands which, when denuded, would be available for agricultural purposes. But perhaps the most convincing evidence that no very considerable part of the heavily timbered lands are or have been available for agricultural purposes, is found in the circumstance that few witnesses were called by the Government who had actually settled upon timber lands and undertaken to cultivate them. If it were true that the timber lands were a good agricultural investment at \$2.50 an acre, surely many persons could

have been found who had made the venture. Not more than four or five of the witnesses called by the Government were now actual residents on timber lands taken up under homesteads or by purchase from the Railroad Company.

Mr. Edmundson, called for the Government, had lived in Jackson County for twenty-seven years, engaged in farming and stock, but he never took up a homestead until the land became valuable for timber about eight years ago, and the lumber was the inducement. The timber on the homestead which he took was 3,000,000 feet, worth \$3,500 (3617-21). But it is said that an actual settler might dispose of the timber and thus secure ready money enough to extract the stumps and prepare the soil for cultivation. But this involves permission to sell the timber before actual residence and cultivation has been continued for any considerable time; and this involves the possibility that the person selling the timber may not use it in clearing the land. Moreover, it proceeds on the assumption that the money secured from the sale of the timber would pay for the clearing of the land. The evidence is that an average timber claim of 160 acres has about 3,000,000 feet of timber. At a stumpage of \$1, it would realize \$3,000 if sold, or less than \$20 an acre; but the evidence is that the cost of clearing the land is from \$25 to \$100 and upward per acre, so that it would be more profitable to buy the quarter section for \$400 and sell it for \$3,000 than to sell the timber and invest the proceeds in the clearing of the land. This accounts for the non-appearance of actual

settlers on timber lands as witnesses for the Government.

- (7) From about 1894 to 1903 the Oregon and California Railroad Company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding \$2.50 per acre, and in several instances between the said dates the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser, at prices ranging from \$5 to \$20 per acre, and in one instance at \$35 per acre, and in one instance at \$40 per acre, and in one instance 45,000 acres at \$7 per acre were sold by said Company to a single purchaser. But each of said sales in excess of 160 acres and at a price in excess of \$2.50 per acre, was of lands chiefly valuable for timber and incapable of settlement and cultivation.
- (8) The defendant Oregon and California Railroad Company has heretofore made approximately 5,360 sales of its land-grant lands, aggregating 820,000 acres, approximately 4,930 of which sales were in quantities not exceeding 160 acres to one purchaser, aggregating about 269,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. But the said 376 sales were of lands which were chiefly valuable for timber and were not capable of settlement and cultivation.

- (9) Substantially all of the said 524,000 acres were sold to persons other than actual settlers who purchased the land for purposes other than settlement, and at prices in excess of \$2.50 per acre; approximately 478,000 acres of said 524,000 acres were sold since the year 1897, and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. But the sales herein referred to were of lands incapable of settlement and cultivation.

Each of these conclusions, except the concluding clause of each, is taken from the stipulation as to facts, Subdivision VIII, items 4, 5 and 6. The last clause of each of these paragraphs is, we think, clearly established by the evidence. Thus the sales to the Booth-Kelly Company, which were among the large sales referred to, were of timber lands (Eberlein, 448).

- (10) The timbered lands of the reserved even sections and Government timber lands generally in the vicinity of the grant, have not been disposed of exclusively or generally to actual settlers, but have been sold under the Timber & Stone Act, which does not require settlement or cultivation, and under the Commutation Clause of the Homestead Act, to persons other than bona fide settlers who entered merely for the timber and sold the land on acquiring title thereto to timber speculators.

This conclusion is supported by substantially the unanimous testimony of all the witnesses who were examined on the subject. There are instances in which it

is claimed that Government timber land has been taken up and is still occupied by actual settlers under the Homestead Law. They are very rare. The witnesses called by the Government who were homesteaders, were living upon lands which were Donation lands, or which were valley or bench lands, except in a few instances. And no witness was called by the Government who was now residing upon lands which he had entered as a homesteader, which were chiefly valuable for timber, except a few recent entries where the witnesses testified that the timber was of very great value.

Mr. Booth testified (2633) that the lands had all been taken up on the even sections either by homesteaders or under the T. & S. Act, but there were no residents. The lands were chiefly valuable for timber, and the party holding the title disposed of them for that purpose. He said that was the case with regard to all the lands which the Booth-Kelly Company owned.

The map introduced in evidence verifies this statement and shows that substantially all the even sections were taken up under the T. & S. Act.

(11) No evidence was submitted that the lands sold in greater quantities than 160 acres to one purchaser and at greater prices than \$2.50 per acre, were lands susceptible of settlement and cultivation.

The theory of the Government's case did not necessitate any such proof. It was that every quarter section of the grant must be sold to actual settlers, irrespective of its character, and that a sale of any one quarter sec-

tion to a person other than an actual settler, was in violation of the proviso. Consequently, the Government rested its case without making any proof that the lands sold in quantities greater than 160 acres to one purchaser were susceptible of settlement and cultivation. The defendants did prove that a very large proportion of the unsold granted lands were incapable of settlement and cultivation. The Government in rebuttal undertook to introduce evidence to the contrary, but it introduced no evidence respecting the character of the lands actually sold by the Railroad Company.

(12) Shortly before the commencement of this action, a considerable number of persons applied to the Railroad Company to purchase various sections of said granted lands. In each instance the lands they sought to purchase were timbered and were chiefly valuable for timber, and were of a value largely in excess of \$2.50 per acre. The Railroad Company had no reason to believe, nor was it a fact, that these applicants were actual settlers upon the said lands, or that they intended to purchase the lands for actual settlement.

It is stipulated between the parties (Stipulation, Subd. IX, Item 3) that

“Since January 1, 1903, and principally since February 14, 1907, persons exceeding 4,000 in number have severally applied to the defendant Oregon and California Railroad Company to purchase certain of the said unsold lands in quantities not exceeding 160 acres to each person; said applicants claiming that they desired such lands to settle and

establish a home upon; and in a few instances claiming that they had settled and established a home upon the lands applied for by them; and at or about the time said applications were made, each applicant stated that he then was willing and able to tender payment at the rate of \$2.50 per acre for the lands applied for by him, and in a few instances such tender was made."

Considering the general evidence respecting the disposition of timber lands, together with the specific evidence as to the applications for the purchase of these lands from the Railroad Company, we think the conclusion is inevitable that the Company had no reason to believe, nor was it a fact, that the applicants were actual settlers upon the land, or that they intended to purchase the lands for actual settlement.

McAllister testified that approximately 10,000 applications for quarter sections were made previous to March 1, 1909. There were 7,991 applications covering 6,168 tracts of land in quarter sections or less; there were 4,749 tracts of land covered by one application; 1,097 tracts covered by two applications; 256 covered by three applications; 54 covered by four applications; 8 covered by five applications, and 4 tracts covered by six applications (1959).

The best timber lands were included in these applications. The lands were chiefly valuable for their timber (1961), and ranged in value from \$10 an acre to \$100 an acre (1962). Mr. McAllister gave a description of the manner in which these applications were made. He said, "Usually some person comes into the office with a bunch

of applications—anywhere from five to ten—from 50 to 100—and presents the applications; presents one application and tenders the sum of \$400 with it; and that being rejected he follows by presenting another application, tendering the same \$400; and that being rejected the process is gone through with the entire bunch he brings in. He claims to be the agent of the applicants” (1959).

Since the starting of this suit the business of presenting these applications has grown up all over the country. The record contains advertisements and circulars showing the character and extent of the business, in encouraging people to believe that they could acquire the timber land in the grant at \$2.50 an acre, the timber being immediately salable for sums largely in excess of the price to be paid. A sort of get-rich-quick-game scheme, stimulated by brokers and agents who receive a cash payment in advance, leaving to the applicant the lottery of success in the event that these lands should be forfeited and become public lands,—or in the event that it should be held that the interveners had acquired rights under the Act of 1869. Brokers and attorneys charge the applicant generally \$75,—sometimes \$50 (1965).

Packages of advertisements and forms used by timber locators were produced and offered in evidence. The character of these advertisements is illustrated by the following:

Advertisement of John M. Kreider (1964) reading:

“Oregon Timber. The United States Government gave six million acres of choice timber land in

Oregon to railroad company over forty years ago to be sold at \$2.50 per acre; 1,300,000 acres remain unsold. Now worth \$50 per acre. Male and female American citizens only can now apply for 160 acres of this land at \$2.50 per acre. Only \$75, payable now. For full particulars address J. M. K., 806-7 New Bank Com. Building, St. Louis, Mo."

Again—

"For Sale Timber Lands. Parties wishing to make an application for some choice railroad lands, heavily timbered, cannot do better than to call at our office and get full particulars. We are prepared to locate several at this time, and our fees, including making all the papers, and location, are within the reach of all. Hoose & Miller, 66 Sixth Street."
(Taken from The Telegram, July 18, 1907.)

Again—

"Timber. We are still in a position to locate several parties on railroad lands in southern Oregon. Cruisings better than four million feet per quarter section; for making tender to the company and filing papers in the clerk's offices afterwards, location, including all attorneys' fees, we charge the sum of \$25. Now come and look into this proposition. If you have never bought any lands from the company before, remember this does not interfere with any of your rights. Call and get full particulars. Hoose & Miller, 66 Sixth Street."

Also—

“Timber Lands. Intending purchasers desiring to locate upon lands with heavy timber in the land grant of the Oregon & California Railroad in southern Oregon, can secure the same by acting quickly. Location fees, including all the necessary attorneys’ fees, are reasonable. Address J. E. Verdin, Grants Pass, Oregon.” (1971.)

Again—

“Cotes and Horsemen. Railroad timber lands \$2.50 per acre, ranging from 3,000,000 to 6,000,000 feet to quarter section, direct purchase. No rights required. Telephone Main 7245. Office 415-416 Mohawk Building, Spokane, Washington.”

There were eighty-eight photographs.

Among the witnesses for the Government who were applicants for these lands, were the following:

O. J. Lawrence, who applied to purchase lands which were worth \$3,000 for the timber (3267).

Whitford, applied to purchase land that had 4,000,000 feet of timber upon it. He was eighty-three years old and claimed that he wanted to buy the land for settlement. (3296.)

Creason, tried to buy a quarter section of timber land worth \$5,000 for \$400. Admitted that none of it could be farmed; that he had to go right into the timber and stumps to start with,—but he classified the land as agricultural (3356). He also applied for one hundred others (3354), the majority of whom lived in Roseburg

(3354). The lands which he tried to get for the others were similar to those which he wanted for himself,—worth \$5,000.

Hileman, tried to purchase eighty acres (3367).

Boyle, tried to buy 120 acres at \$2.50 an acre, which he says it is worth \$10 an acre (3519).

Lamb, applied to purchase a quarter for \$400, which he could have sold for \$3,600, and which he picked out because it has good timber (3568-3588).

Miller, tried to purchase a quarter section of timber land which he expected to get for \$2.50 an acre. He had never been over it, but a cruiser told him it was good timber land (3753).

Anderson, put in an application for timber land and went upon the land once and put up a notice, but never did a thing on it (3863).

Martin, describes how locators placed interveners, receiving from \$25 to \$200 (3314-3317).

Bailey, testified that he offered to locate a quarter under the Act of 1869 (3707). It was timber land, worth \$4000 or \$5000. The person for whom he was to locate the land was to pay him \$150,—he actually paid only \$50 (3707).

McLafferty, tells about the efforts of the McLafferty family to buy railroad lands (3872).

McMasters, applied to buy timber land which had upon it about 3,000,000 feet of timber (4010).

The overwhelming weight of evidence in the case is that timber lands, whether belonging to the Government

or to the Railroad Company, were not entered or purchased for purposes of settlement,—but for purposes of speculation; and that the lands acquired were immediately turned over to timber companies.

(13) The withdrawal of the lands from sale in 1903 was occasioned by the necessity which had then arisen for the survey, cruising and classification of the lands, and was continued after 1906, by reason of the destruction by the San Francisco fire of the records theretofore made of such surveys, cruising and classification, and such withdrawal was afterward continued by reason of the institution of this suit and the uncertainty as to the rights of the parties in the disposal of said lands.’’

The stipulations of the parties are that nearly all of the granted lands sold previous to May 12, 1887, were sold to actual settlers in small quantities (Subd. VI, Item 8 E); and the disposition of lands between 1894 and 1903 covered by the stipulation cited above (Subd. VIII, Items 4, 5 and 6). It is also stipulated (Subd. VIII, Item 3) that a rapidly increasing demand for the lands of the Oregon and California Railroad Company in large quantities and at increased prices commenced about 1889, or 1890, and has continued ever since; and Subd. IX, Item 4, reads, that

“On or about January 1, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands, and the said Company at

all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding Item 3 of this Subdivision hereof (quoted on previous page) claiming that all the lands so applied for are essentially timber lands unsuitable for any other purpose."

Mr. Eberlein testified that in the Spring of 1903 the sales of land were suspended (2230). This was because of the confusion into which the system had fallen. The lands had not been fully surveyed (2233). The work of examination was begun in the Spring of 1903 and completed in the Fall of 1904. Then it was necessary to have the tax titles examined (2237). That work was not completed until March, 1906, and the fire at San Francisco destroyed all the records (2230-2248).

He describes the loss of the papers and the efforts made to supply the loss (2248-2251). He testified that no applications were made for lands not timber (2254) although in some instances they were for water power and sometimes for mineral. Notice was given that the Railroad Company would sell agricultural lands, but not timber lands (2258). So far as applications were made for agricultural lands, either then or later, they were investigated and negotiations for sale entered into (2286-7). After the San Francisco fire, which occurred in April, 1906, the Company obtained copies from abstract companies and from public offices from which tabulations of their lands were prepared (Exhibit 23, p. 22). The Company reserved certain unsold land for timber, iron, coal and oil; Exhibit 8 attached to answer, is a statement of those lands.

Mr. Dixon, Secretary of the Booth-Kelly Lumber Company, testifies that since the agitation commenced in 1906, there has been virtually a cessation of sale because of the uncertainty of title (2637 et seq.)

There was considerable evidence offered on behalf of the Government to the effect that the withdrawal of the lands from sale had arrested the development of the country.

(14) The Railroad Company has paid taxes upon the lands patented to it to the aggregate of \$3,182,169.57; in some of the Counties the taxes have exceeded \$2.50 per acre.

The defendants' answer alleges that at all times since the lands were patented to the Railroad Company it paid the taxes levied and assessed upon and against the said lands, which payment in all amounted to \$1,827,234.10. A statement of the taxes paid was produced and offered in evidence (Ex. 320, p. 7167), and the assessment rolls were produced for the Counties of Washington, Multnomah, Yamhill, Clackamas, Polk, Marion, Lincoln, Benton, Linn, Lane, Douglas, Coos, Josephine, Jackson, Klamath, Columbia and Tillamook showing the taxes paid from 1904 to 1911 (Eddy, 2554, Exhibit 319-7150). The total taxes paid from 1891 to 1911 are shown upon Exhibits 319, 320 and 321 (pp. 7150, 7167, 7251). These Exhibits show that in Columbia County the total tax per acre for the same period of time was \$2.75; Coos County, \$2.54; Multnomah, \$2.55.

Eddy testified from the best available data that prior to 1899 the Company paid in eight counties \$59,-927.52. From 1891 to 1904 \$737,601.12. From 1905 to 1911 \$1,637,314.69, or a grand total of \$2,434,843.33.

In 1911 the holdings of the Company were 2,119,927 acres, so that on this acreage the taxes paid would average \$1.15 per acre. From 1874 to 1898 inclusive, the taxes paid were \$326,420.61; in the latter year the holdings represented 2,322,084 acres, so that the taxes paid at that time would average, with a very small fraction, fourteen cents an acre.

The average tax paid per acre was a fraction over 76 cents (2568, 2569). The total tax paid before the bringing of this suit was 38 cents per acre, apportioning the tax upon the whole land grant, excluding the lands that had been sold. More than one-half the taxes have been paid since the suit was brought (2569), but manifestly the average could not be computed upon the total land grant, but varies as the lands are sold, since the purchaser pays the tax upon the sold land.

Hence, the percentage per acre paid by the Company would be very much larger than 38 cents per acre. Moreover, the rate of taxation in some counties is much less than in others. The sum paid for taxes per acre in those counties where the lands are not salable, exceeds in some instances \$2.50 an acre.

(15) Continuously from the opening of the line the Railroad Company has handled freight and passengers for the Government without cost. The value of these services was very great.

Mr. Sherburne, head clerk of the Government Accounts of the Southern Pacific Railroad Company, who has been continuously in the Department since 1881, produced a statement of Government freight and passenger transportation between Portland and Roseville Junction for the years 1906 and 1910 (2405). The accounts previous to that date were destroyed by the San Francisco fire. The witness testified that the volume of business was approximately the same as that shown upon the statement by years, with the exception of the period of the Spanish-American War in 1898, when it was heavier by reason of the great many regiments coming to Portland from San Francisco (2406). The witness testified to the Department Regulations as to the manner in which the bills for charges are to be rendered and the settlement made with Government officials (2407-2411). These were the services rendered gratuitously to the Government. Everything handled over the line for the United States, except the mail, is free. The testimony of this witness was corroborated by the Chief Clerk, Ormandy.

Mr. Adams testified that this free movement applied to all shipment from any part of the United States received and carried over the line, except United States mail; comprised the transportation of troops, and the Government has continuously and constantly used the road for that purpose (2146).

It may properly be assumed that the estimates given by the defendants' witnesses with regard to the value of the services, is substantially correct, since it is in the power of the Government through the records in the Quartermaster's Department to produce the statistics.

- (16) From 1879 to 1903 inclusive, under and in compliance with the provisions of law to that effect, the Railroad Company reported to the Commissioner of railroads the sales made by it of the granted lands, and the prices realized, showing that it continuously assumed and exercised the authority to sell certain of said lands at prices in excess of \$2.50 an acre, and in quantities larger than 160 acres to one purchaser. The Commissioner of Railroads reported these facts to the Secretary of the Interior, and such report was annually, during the period mentioned, laid before the President and the Congress of the United States.

The stipulations which justify this finding are contained in Subd. XXI, and the semi-annual reports are attached.

- (17) On or about the 1st of July, 1887, the Oregon and California Railroad Company made a mortgage deed of trust to the Union Trust Company to secure the payment of its first mortgage bonds to the amount of \$20,000,000. The bonds were issued and used in large part to retire bonds secured by earlier mortgages of June 1, 1881, and May 26, 1883, and a large part of the remainder was negotiated abroad. There are now outstanding bonds to the aggregate amount of \$17,745,000, most of which are held abroad. The earlier bonds referred to were used to provide funds, aggregating approximately \$5,000,000, which were used in the construction of the railroad. The bonds secured

by the Union Trust Company mortgage were used to retire the aforesaid bonds and to complete the construction of the railroad.

These facts are all stipulated, Subdivision VI, Items 16, 17, 18, 19, 20, 21 and 22. The balance sheet as of February 11, 1912, shows the outstanding bonds to be \$17,745,000 and with the capital stock makes an aggregate of \$36,000,000. The evidence is that this bears a close relation to the cost of the property.

The testimony of Mr. C. P. Lincoln, head clerk of the Auditor's Office, shows that there have been additions and betterments amounting to \$4,000,000, making a total cost of \$40,000,00.

The railroad, however, has its chief value in its connecting line of the Union Pacific System, and if that system is broken up, the Oregon and California Railroad Company as an independent line, would unquestionably depreciate greatly in value.

Mr. Koehler, who was the receiver and afterward the general manager of the Company, was called by the Government; he estimated the value of the road at \$50,000 a mile, but testified that the Company was once in the hands of a receiver in 1885, and that it was near bankruptcy quite often (1904). He also testified that without through traffic, the value of the property would not be as much as it is by enjoying this through traffic, but he does not undertake to give an estimate of what it would be worth if the present traffic arrangements should cease (1905). Other lines of road have been constructed and are being projected which are likely to

interfere with the monopoly which at one time this Company had, and which will tend to depreciate its value (1906-8).

FINAL HEARING AND DECREE

The case came on for final hearing at Portland on April 29, 1913, before District Judge Wolverton, and was submitted without argument upon the merits. On the following day the Judge made an oral statement which is a part of the record. It appears from this statement that the cause was decided without regard to the evidence which had been taken upon the fact whether the granted lands were susceptible of actual settlement and cultivation. The Court held substantially that inasmuch as it was admitted that the Railroad Company had sold portions of the granted land to persons who were not actual settlers, in quantities greater than 160 acres to a purchaser, and at prices in excess of \$2.50 an acre, and inasmuch as the proviso of the Act of 1869 was a condition subsequent, as he had determined upon the hearing of the demurrer, and inasmuch as the Court had jurisdiction to enforce the forfeiture arising from a breach of the condition—therefore, the Government was entitled to a decree forfeiting the unsold land. Respecting the evidence produced before the Master, the Court said:

“A very great deal of testimony has been taken in the case, running up into several thousand pages of typewritten matter, and besides that, a great many exhibits in various forms, would have to be

examined should the Court go through the entire testimony. But I do not deem it necessary for the Court at this time, the case having been submitted without argument, to enter into a thorough and an extended investigation of the testimony. The vital question in the case, and the paramount question, as previously observed, is touching the condition attending the grant. The Court said (on the argument of the demurrer) that the condition was a condition subsequent, and that for a violation of that condition, the grant should be forfeited to the Government of the United States."

The Court then recites the stipulated facts as to the sales of land by the Railroad Company and as to the withdrawals of lands from sale, and says:

"Upon the theory adopted by this Court in its determination of the cause upon the demurrer, the facts set out in the stipulations show an infraction of the law. They show a violation of the condition subsequent. The Court having held that this proviso in the statute constituted a condition subsequent, which was a part of the law and must be complied with by the Railroad Company, and if the Company violated the same by refusing to sell in quantities not exceeding 160 acres, or to actual settlers, or for a price not exceeding \$2.50 per acre, that the lands should be forfeited. This stipulation shows that the Company has violated that provision, first, in selling large quantities of these lands in tracts exceeding 160 acres to a single purchaser,

and for prices largely exceeding the \$2.50 per acre which is prescribed by the statute. Furthermore, the stipulation shows that the Railroad Company has actually withdrawn these lands from sale, and as I have remarked, under the theory adopted by the Court, this stipulation on the part of counsel shows a clear violation of the proviso of the law, and therefore the Company has put itself in a condition to have a forfeiture of these lands declared."

The Court then observes that the claim of the Railroad Company that the Government is estopped by standing by and knowing that these lands were being sold, and allowing them to be sold, and therefore, ought not to prosecute this proceeding, was also determined upon the demurrer, and that the testimony submitted had not changed that issue. With regard to the position of the Union Trust Company, the Court said:

"Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the Court that the grant to the Railroad Company carried upon its face notice of what it is. The grant is not only a grant, it is a law, and people dealing with the grant must take notice of the terms thereof and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice what the law required, and it must be considered to hold subordinate to any interest that the Government might acquire in the property by reason of an infraction of the law which will entitle a forfeiture of the grant."

The questions of fact which we have previously discussed were left unconsidered upon the final hearing, and were plainly regarded as immaterial.

DECREE

The decree adjudges as follows:

(1) That all the lands set out in Schedules A and B, attached to the decree

“have become and now are forfeited to, and the title to all the said lands, and the estates in land have reverted to and now is revested in the United States of America, and all of said lands, and estates in land now are the absolute property of the United States of America, free from any and all claim of right, title, interest or lien in, to, or upon the same, or any part thereof, by or in favor of the defendant, cross-complainants and intervenors herein, or either or any of them.”

(2) Quieting and confirming the title, as against the claims of the defendants, cross-complainants and intervenors.

(3) Enjoining the defendants, cross-complainants and intervenors from claiming or asserting title, or from interfering with the property as set forth in Subdivision III.

(4) Stating with more particularity the property affected and covered by the decree.

(5) Providing for the operation of the decree upon certain lands in the State of Washington.

(6) Dismissing the cross-complainants, and bills and petitions in intervention.

(7) Denying the complainants' prayer for accounting by the defendants.

(8) Awarding costs.

ASSIGNMENT OF ERRORS

The defendants, the Railroad Company and the Union Trust Company, filed a large number of assignments of errors (137 in number).

It is unnecessary to set forth at length all of these assignments of error. They are sufficiently full to raise all questions of fact and of law which are presented by the pleadings and proofs, and they challenge the correctness of each of the particular matters adjudged and decreed by the Court. This defendant calls attention to some of the errors, assigned as follows:

“16. The Court erred in holding that the above-mentioned defendant, Union Trust Company, had no lien on said lands, or any part thereof, and in holding that the lien of the said defendant evidenced by the deed of trust of July 1, 1887, was of no avail, and without force or effect, and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled.”

“17. The Court erred in holding that this defendant, as trustee for the owners and holders of

bonds issued under and by virtue of the trust mortgage of July 1, 1887, was not entitled to the rights, and to all or any of the rights, of an innocent purchaser for value."

"18. The Court erred in holding that whatever interpretation might be given to the proviso touching actual settlers of said Act of April 10, 1869, or whether the same created a condition subsequent or not, this defendant, Union Trust Company of New York, was not entitled to a lien upon the right of way and the whole land grant of the said Act of July 25, 1866, as security for the sum of \$20,000,000, as provided in said mortgage of July 1, 1887, and in holding that this defendant was not entitled to have said lien impressed upon said right of way, and said entire land grant to be satisfied first and before forfeiture or reversion to the complainant, or said United States of America, if forfeiture or reversion should be decreed."

"19. The Court erred in holding that the right to forfeiture for breach of condition subsequent, is not a right that may be waived, and in holding that in this case as to this defendant, said right, if it ever existed, was not waived by said complainant, and said United States of America, and in holding that complainant and said United States of America is not estopped to allege a breach of said condition, or to pray or have forfeiture as against this defendant."

“24. The Court erred in holding that in respect of the said land grants, or either of them, there had been an application thereof, or either of them, or their successors in interest, or by this defendant, individually, or as trustee of the said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, other than in fulfillment of and compliance with the paramount and primary purpose of Congress in making the said land grants, or either of them.”

“26. The Court erred in holding that the application of the said East Side Grant to the construction of the railroad contemplated in said Act of July 25, 1866, by way of a deed of trust, or mortgage of said land grant to raise funds or to refund the same for the construction of such railroad, was in subjection of and subordination to and restricted by the proviso in said Act of April 10, 1869, relative to actual settlers.”

“27. The Court erred in holding that a sale or sales of lands forming part of said East Side grant pursuant to the mortgage or mortgages, deed or deeds of trust of said grant for the purposes of raising such construction fund, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constitute a departure from or violation of any purpose or enactment of Congress in the premises, or were other than a ful-

fillment of and compliance with the policy, intent and legislation of Congress.”

“28. The Court erred in holding that the lands of said East Side Grant, or any part thereof, had been sold in breach or violation of any provision of said Act of July 25, 1866, or of the said Act of April 10, 1869.”

“29. The Court erred in holding that the grantee of said East Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same, or any part thereof, in breach of any Act of Congress, or otherwise, than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises.”

“30. The Court erred in holding that the application of the land grant under the said Act of May 4, 1870, denominated by way of distinction, the West Side Grant, to the construction of the railroad therein contemplated by way of mortgage or deed of trust of said grant, to raise funds, or to refund the same for the construction of such railroad, was in breach of any provision of said last mentioned Act, or in violation of any Congressional intent or

legislation in the premises, or other than a fulfillment and compliance with the intent and legislation of Congress.”

“31. The Court erred in holding that the application of the said West Side Grant to the construction of the railroad contemplated in said Act of May 4, 1870, by way of a mortgage, or deed of trust of said grant to raise funds, or refund the same, for the construction of such railroad, was in subjection and subordination to and restricted by anything in said last mentioned Act as to actual settlers.”

“32. The Court erred in holding that a sale or sales of lands forming part of said West Side Grant, under any mortgage or deed of trust of said grant for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constituted a departure from or violation of any purpose or enactment of Congress in the premises, or were other than a fulfillment of and compliance with the policy, intent and legislation of Congress.”

“33. The Court erred in holding that the lands of said West Side Grant, or any part thereof, had been sold in breach of any provision of the said Act of May 4, 1870.”

“34. The Court erred in holding that the grantee of said West Side Grant, or its successors in

interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same, or any part thereof, in breach of said Act of May 4, 1870, or otherwise than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises."

"38. The Court erred in not holding that the said granted lands, East Side and West Side, both or either, are timbered in character and were and are not capable of actual settlement."

"64. The Court erred in holding that the said proviso of said Act of April 10, 1869, was a condition subsequent."

"65. The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of said proviso."

"67. The Court erred in holding that any provision in said Act of May 4, 1870, touching sales to actual settlers was a condition subsequent."

"68. The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of any provision in said Act of May 4, 1870, touching sales to actual settlers."

“69. The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect either to said East Side Grant, or to said West Side Grant, or any part thereof.”

“70. The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect to either of said grants, in any re-entry for breach of condition, or legislative equivalent thereof, or in any legislative declaration of forfeiture.”

“71. The Court erred in holding that there was jurisdiction in the Court on the equity side of the cause or subject-matter of this suit, and in not dismissing the bill of complaint.”

“72. The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture of said East Side Grant for the breach of an assumed condition subsequent, if such breach there was, in said proviso of said Act of April 10, 1869.”

“73. The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture for the breach of an assumed condition subsequent, if such breach there was, in any provision of said Act of May 4, 1870.”

“74. The Court erred in holding that the complainant was entitled to a decree quieting its title to either of said grants against this defendant, individually or as trustee, said Oregon and California

Railroad Company, said Southern Pacific Company and said Stephen T. Gage, individually or as trustee, or any or either of them, or any party to the cause.”

“75. The Court erred in holding that as foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant Oregon and California Railroad Company, or its grantees, if such there were, did not have the legal title to such grants.”

“81. The Court erred in holding, on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side Grant, that any breach of said assumed condition subsequent, or any assumed cause of forfeiture, had not been waived by Congress and complainant.”

“82. The Court erred in holding, on the assumption of a condition subsequent, in any provision of said Act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to the said West Side Grant, that any breach of said assumed condition subsequent, or any assumed cause of forfeiture, had not been waived by Congress or complainant.

“83. The Court erred in holding, on the assumption of a condition subsequent, in respect of the said proviso, or on the assumption of any cause

of forfeiture in respect to said East Side Grant, that a breach of said assumed condition subsequent or any assumed cause of forfeiture, had not been acquiesced in by Congress and complainant."

"84. The Court erred in holding, on the assumption of a condition subsequent, in any provision of said Act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side Grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been acquiesced in by Congress and complainant."

"88. The Court erred in not holding, on the assumption that the said proviso in the said Act of April 10, 1869, or said provision in said Act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acceptance and use of the said railroad."

"95. The Court erred in not holding that the proviso for the sale of the lands granted to actual settlers contained in the Act of April 10, 1869, and the provision as to settlers in the Act of May 4, 1870, are, and each of them is, void because the same is repugnant to the grant, and tends to defeat and destroy the primary purpose and intent of Congress in making said grants in aid of the construction of said railroads and telegraph lines."

"101. The Court erred in not holding that the grantees under said Acts of Congress, or their successors, associates or assigns, had a right to mort-

gage the whole or any part of said land grant to obtain money wherewith to construct the said railroad and telegraph line.”

“102. The Court erred in not holding that under the terms and provisions of said Acts of Congress of April 10, 1869, and of May 4, 1870, the grantee or grantees mentioned in said land grants, cannot and could not perform said provisions as to the sale of the lands granted to actual settlers, and by reason thereof, the performance of said provisions was excused and the said granted lands vested in said grantees absolutely and discharged of said conditions.”

“115. The Court erred in not holding that this suit cannot be maintained as one to enforce forfeiture, nor to quiet title, because

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture has not been adjudicated by a Court of Law; and

(c) The defendant, Railroad Company, holds the legal title to and the possession of said granted lands.”

“116. The Court erred in not holding that the said defendant, Oregon and California Railroad Company, was entitled to a trial by jury of the issue as to whether or not any of the conditions of said grants, or either of them, had been breached.”

“117. The Court erred in not holding that the complainant and Congress had knowledge of all

the alleged breaches of the provisions in each of said land grants for the sale of the granted lands to actual settlers; and that the complainant and Congress acquiesced in said breaches, with the knowledge thereof, and complainant is estopped to claim a forfeiture of said land grant, or any part thereof."

"118. The Court erred in not holding that during the year 1879, down to and including the year 1903, reports were regularly and semi-annually made of the transactions of the land Department of said defendant, Oregon and California Railroad Company, to the auditor of Railroad Accounts created by the Act of Congress of June 19, 1878, showing the total cash receipts from all sales of the said granted lands to the date of said report; the average price per acre for all sales to the date of said report, and the average price per acre for all purchases to the date of said report; the maximum price per acre from sales (not town lots); the minimum price per acre from sales (not town lots); the maximum price per acre asked at the time of making such report; the minimum price per acre asked at the time of making such report; and that the Auditor of Railroad Accounts, pursuant to the provisions of the said Act of Congress of June 19, 1878, made like annual reports during the whole of said period to the Secretary of the Interior, and that annually, during the whole of said period, the Secretary of the Interior transmitted the said reports

to Congress, and that said reports showed that during the year 1879, down to and including the year 1903, the said defendant, Oregon and California Railroad Company sold some of said granted lands at a price in excess of two dollars and fifty cents (\$2.50) per acre; also in quantities exceeding one hundred and sixty acres; and that Congress and complainant with the knowledge of the said matters and things contained in said reports, acquiesced therein and permitted the said defendant Railroad Company to take action accordingly and to alter its position and to continue to so administer said grant, and that complainant was, and is, therefore, estopped from claiming a breach of any of the conditions, if such there be, in said grant, or a forfeiture on account thereof, and has waived said alleged breaches and acquiesced therein."

"122. The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein."

"123. The Court erred in not holding that the evidence in this case is insufficient to support or sustain the decree rendered herein."

"124. The Court erred in not holding that the evidence in the above-entitled case was wholly insufficient to sustain and support the decree rendered in said cause, in that there is no evidence in the record showing any breach or violation of the proviso of the Act of April 10, 1869, or any of the provisions of the Act of Congress of May 4, 1870,

as to the sale of said granted lands to actual settlers only, in quantities not exceeding one hundred and sixty (160) acres to one purchaser, and at a price not exceeding two dollars and fifty cents (\$2.50) per acre."

"125. The Court erred in not holding that the evidence in said cause was insufficient to support the decree rendered herein, or any decree in favor of the complainant, and that there is no evidence in this cause showing any breach or violation of the proviso in the Act of Congress of April 10, 1869, or of any of the provisions of the Act of Congress of May 4, 1870, as to the sales of the said granted lands to actual settlers."

"127. The Court erred in rendering the judgment and decree herein against the said defendant, Oregon and California Railroad Company, forfeiting the lands and the estates in lands described in the said decree, or any of said lands, and that there is no evidence whatever in the record in this cause showing that the said defendant violated or breached any condition in either of said Acts of Congress of July 25, 1866, June 25, 1868, or April 10, 1869, or May 4, 1870."

"130. The Court erred in holding that the title to so much of either of said grants as had been patented prior to October, 1902, was not concluded against complainant herein and that the alleged cause of action had not been barred, and the title to such patented lands made absolute."

ARGUMENT FOR THE DEFENDANT, THE UNION TRUST COMPANY

Preliminary Note

The counsel for the Railroad Company have presented in their brief an elaborate argument upon the proposition that the rights acquired by the East Side Company under the Act of 1866 deprived Congress of the power by the Amendatory Act of 1869 to impose new conditions on the estate; besides the Amendatory Act expressly saved "rights acquired" under the Act of 1866. We have nothing to add to the exhaustive and able argument submitted by the Railroad Company upon this proposition.

There are certain other aspects of the case which have not been so fully presented. On behalf of this appellant, we shall deal with these in the following order:

First: The proviso of the Act of 1869 applies only to lands susceptible of settlement and cultivation and does not include timber lands.

Second: The proviso of the Act of 1869 as construed by the Court below is void, as being impossible of performance and repugnant to the express purpose of the grant.

Third: The proviso of the Act of 1869 was not intended to create and did not create a condition subsequent.

Fourth: The provision of the Act of 1870 respecting actual settlers was not a condition subsequent.

Fifth: The provisions of the Act of 1869 and of the Act of 1870 respecting actual settlers are restrictive covenants and if enforceable at all are enforceable in a Court of Equity as to lands susceptible of settlement and cultivation only.

Sixth: No evidence was submitted of a breach of the provisions of the Act of 1869 or of the Act of 1870 relating to actual settlers, whether regarded as conditions or covenants, which justifies the decree herein, or requires any decree in favor of the complainant.

POINT I

THE PROVISIO IN THE ACT OF 1869 APPLIES ONLY TO LANDS SUSCEPTIBLE OF ACTUAL SETTLEMENT AND CULTIVATION, AND DOES NOT INCLUDE TIMBER LANDS.

It is, we think, apparent that the proviso in the Act of 1869 "that the lands granted by the Act aforesaid (Act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre," must be construed either as applying (1) only to such persons as were actual settlers on the land when the grant took effect, or (2) to persons who should thereafter become actual settlers on so much of the land as was susceptible of actual settlement and cultivation, or (3) to all persons who should seek to purchase the lands asserting an intention to settle upon and cultivate them, whether capable of actual settlement and cultivation or not.

It is of the first importance to ascertain the true interpretation of the Act in this particular. As preliminary to this inquiry, a brief reference to prior federal land legislation is essential.

(1) Previous federal land legislation.

The term "actual settlers" was used in early federal legislation usually, if not always, to designate persons who were in the occupation and cultivation of public land previous to a period named in the particular statute. Thus, by the Act of March 20, 1805, every person who had become an actual settler upon land in Louisiana prior to the treaty of cession, was confirmed in the tract of land he had inhabited and cultivated (2 Stat. 325). So similar protection was afforded to actual settlers in the Territory of Missouri (2 Stat. 751). Again, the act for ascertaining claims and titles to land in the Territory of Florida (Law of May 8, 1822, 3 Stat. 709, Amended 3 Stat. 755) directed that claims in favor of actual settlers should be confirmed; and by a later Act (4 Stat. 6) it was provided that no person should be taken or deemed to be an actual settler within the provisions of the act last cited, unless such person, or those under whom he claimed title, should have been in the cultivation or occupation of the land at or before the period of cession. By the Act of April 22, 1826, (4 Stat. 154) pre-emption rights in Alabama, Mississippi and Florida were given to actual settlers who were described as persons who actually inhabited and cultivated the land.

The public lands were early appropriated by Congress to the payment of the public debt (Act of August 4, 1790, 1 Stat. 138), and until the public debt was paid, the proceeds of the sales were applied to that purpose. The first law regulating the sale of public lands was enacted in 1796, and was applicable only to the Northwest Territory (1 Stat. 464). It provided for a survey, and after survey, for sale in sections, at public auction, at a price not less than two dollars an acre. No limitation was placed upon the number of sections that could be bought by the same purchaser. An amendment in 1800 (2 Stat. 73) authorized the private sale by the registers of the land office at not less than two dollars an acre, of lands that remained unsold after public auction; this Act authorized sales on credit, and a resale in case of default. The latter provision was temporarily suspended in favor of actual settlers in 1806 (2 Stat. 378) and the credit system was abandoned in 1820 (3 Stat. 566). By the Act of March 3, 1807 (2 Stat. 437) regulating grants of land in Michigan Territory, persons in actual possession, occupancy and improvement of any tract of land prior to July 1, 1796, which occupancy and possession had continued to that time, were confirmed in title. In the same year an act was passed prohibiting settlements on public lands, but permitting actual settlers to remain as tenants at will of the United States (2 Stat. 445) and a series of such acts followed down to 1820 (March 28, 1816; March 3, 1817; April 20, 1818). By the Acts of July 5, 1813 and April 12, 1814, actual settlers were given rights of pre-emption

in the Territory of Illinois, Missouri and that part of the State of Louisiana formerly comprising the Territory of New Orleans.

In 1820 (3 Stat. 566) a general law for the sale of public lands was enacted. It provided that the public lands when offered for sale at public auction should not be sold for less than one dollar and a quarter an acre. Lands offered at public sale and remaining unsold at its close, were made subject to private sale by entry at the land office at one dollar and a quarter an acre. The substance of this Act was carried forward into the Revised Statutes (R. S. Sec. 2353, et seq.).

The first general pre-emption law was enacted in 1830 (4 Stat. 420). It provided that any settler or occupant of the public lands who was *in possession* and *cultivated* a part thereof in the year 1829, should be authorized to enter with the register of the land office not more than 160 acres, upon paying the then minimum price of the land. The Act was temporary and was extended by the act of June 22nd, 1838, down to 1842 (5 Stat. 251); (5 Stat. 382). The Extension included only settlements prior to its passage.

The "Pre-emption Law" of 1841 (5 Stat. 543) provided a general system of pre-emption. It allowed *future settlements* to be made with the right of *pre-emption*—which was a new feature in the pre-emption system (Johnson v. Towsley, 13 Wall. 72). To secure this right of future pre-emption, the proposed settler was authorized to enter upon unoccupied public land; *he was required to inhabit and improve it and to erect a building thereon*, and if the land was subject to private

sale, he was required to file a notice of entry within three months and make final proof and payment within twelve months. The Act extended only to lands which had been surveyed prior to settlement.

At the time of the passage of the Pre-emption Law, only an insignificant part of the public domain had been surveyed. No lands had been surveyed west of the Mississippi River, except in Missouri. The lands which had been surveyed were agricultural in their character. No arid, mountainous or forest lands had been, to any appreciable extent, surveyed. The Pre-emption Law was not in its terms applicable to lands incapable of residence and cultivation, and at the time it was enacted it could not have been applied to any other than agricultural lands. It was finally repealed in 1891.

The Territory of Oregon was organized in 1848. At that time the population was only 13,294. In order to induce settlement, Congress in 1850 passed what was known as the "Donation Act," (Act of September 27, 1850, 9 Stat. L. 496). A surveyor general for the State of Oregon was appointed, and it was provided that he should cause to be surveyed in townships and sections in the usual manner, and in accordance with the Laws of the United States which may be in force, the district or country between the summit of the Cascade Mountains and the Pacific Ocean, south and north of the Columbia River, provided, however, that *none other than township lines shall be run where the land is deemed unfit for cultivation*. By this Act there was granted to every white settler above the age of eighteen, a half section, or 320 acres,—and if married, 640 acres, a

half to be owned by his wife. *Four years of continued residence and cultivation were required before a patent could issue.*

The laws of Congress relating to pre-emption by individuals had at that time no application in Oregon, because public lands there had not then been surveyed. (*Starr v. Starr*, 6. Wall. 402). The Donation Act was amended in 1853 (Act of February 4, 1853, 10 Stat. L. 158) so as to permit the settler, after an occupancy of two years, to commute by payment of \$1.25 an acre. This Act also provided that all lands within the territory west of the Cascade Mountains not claimed under the provisions of the Donation Act, could be sold at public sale and private entry as other public lands of the United States. In 1854 (Act of July 17, 1854, 10 Stat. L. 305) the period for commutation was reduced to one year, and it was also provided that the pre-emption privilege under the Pre-emption Law of 1841 should be extended to lands in Oregon and Washington Territories, whether surveyed or unsurveyed. The result of this extension of the pre-emption right to unsurveyed lands, was to permit the settlers to acquire a prior right of pre-emption to such lands, which could be perfected, however, only upon notice given after the lands had been surveyed and plotted. (*Lownsdale v. Daniels*, 100 U. S. 113). The lands entered under the Donation Law were of an agricultural character. They were situated, for the most part, in the Willamette Valley, and to some extent also in the valleys in southern Oregon. By the provisions of the Act, the entries were limited to

lands which were fit for cultivation. The Donation Act expired by limitation in 1855.

Popular agitation for the disposal of public lands, without price, to persons desiring to settle upon and cultivate the soil, resulted in the passage of the Homestead Act in 1862 (Law of May 20, 1862, 12 Stat. L. 302) which was entitled "An Act to secure homesteads to actual settlers on the public domain." The Act permitted an entry upon a quarter section, or less, of unappropriated public lands, after the same had been surveyed. The applicant was required to make oath that the application was honestly and in good faith made for the purpose of *actual settlement and cultivation*, and that he would faithfully and honestly endeavor to comply with all the requirements of law as to *settlement, residence and cultivation* necessary to acquire title to the land applied for; that he was not acting in collusion with any persons to give them the benefit of the land entered, or the timber thereon; and that he did not apply to enter for the purpose of speculation, "but in good faith to obtain a home for himself or herself." At the expiration of five years from the date of such entry, if the applicant should have resided upon or cultivated the same for the term of five years, he might make final proof and obtain a patent to the land.

The homesteader was authorized to commute by paying the minimum price for the quantity of land entered at any time before the expiration of the five years on making proof of settlement and cultivation as provided by the law granting the pre-emption rights (Revised Statutes, Section 2301). At the time of the

passage of this Act, Oregon had been admitted to the Union, and the population, under the impulse of the Donation Act, had risen to 52,465, or about one inhabitant to every two square miles. The Homestead Law was limited to lands which had been surveyed, and at that time the whole area of surveyed lands in the State of Oregon was about 6,000,000 acres, out of a total area of 61,000,000. The Willamette Valley, a fertile, level country, about as large as the State of Connecticut, embraced much the largest portion of the surveyed lands—the remainder being found in the valleys of the Rogue and Umpqua Rivers, and in other scattered parts of the state.

From this summary of the land legislation previous to 1866, it appears that when the Act of July 25 of that year was passed, there were four methods by which title to public lands might be acquired. (1) By public auction at not less than the minimum price. (Repealed March 3, 1891). (2) By private sale of lands which had been exposed to sale at public auction and remained unsold. (3) Under the Pre-emption Law of 1841, and (4) Under the Homestead Law of 1862.

(2) The meaning of the proviso as construed in connection with prior land legislation.

(a) The claim was early made that the proviso was intended to secure a right of pre-emption to those who were on the land as actual settlers at the time the grant went into effect. (See letter of Joseph S. Wilson to George H. Williams, U. S. Attorney General, Vol. 1,

Govt. Exhibits, p. 5338; Opinion of S. M. Wilson, Ibid. p. 5347.) Such an interpretation of the proviso is in harmony with the early legislation to which we have referred and is consistent with a literal construction of the words employed.

There is a plain distinction between an actual settler and a prospective settler. In its primary meaning, the word "actual" represents an existing condition. It notes a distinction between that which is constructive—resting upon implication, and that which is concrete and obvious. It notes a distinction between that which is existent, and that which may exist in the future.

The signification of the word "actual" in connection with "settler" connotes the idea of actual, existing settlement. "Actual (Lat. *Actualis*) belongs to that which is beyond the state of mere probability, possibility, tendency, progression, evolution. The actual is the conceivable *realized*, and where this conceivable thing is not only possible but natural to conceive or to be expected in a certain order of things, actual, like the French *actuel* comes to have the force of *present in time*. As the *actual* is opposed to *possible*, *probable*, *conceivable*, or approximate, true to false, positive to indeterminate, dubious, indirect, or negative, and veritable to supposititious, or unauthentic, so Real (Lat. *realis*) is opposed to imaginary or feigned. It expresses that which has an existence of its own and not such as our fancy might attribute to it or our ingenuity impose upon it." (Smith's Synonyms Discriminated.)

Force is added to this contention by reference to subsequent and contemporaneous legislation of a somewhat similar character.

If the intention of Congress was to permit persons to make future settlements upon the land in order to become actual settlers, the words employed in the proviso must be given not their primary meaning,—but an extended meaning, imposing restrictions upon the grant of a very general and uncertain character. There are no directions to secure intelligent action upon the part of the Railroad Company in ascertaining who should be regarded as actual settlers under such a construction of the proviso. If it had been the purpose of Congress to arrange a scheme for the future disposition of the grant by the Railroad Company to persons who should thereafter come within the designation of actual settlers, it would have been natural to adopt a plan similar to that which was inserted in the grant to the Union Pacific Railroad Company. That grant contained the following provision (July 1, 1863, see Chap. 120, 12 Stat. L. 489, Section 3):

“Provided that all mineral lands shall be excepted from the operation of this act, but where the same shall contain timber, the timber thereon is hereby granted to said Company. *All such lands so granted by these sections which shall not be sold or disposed of by said Company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like*

other lands, at a price not exceeding \$1.25 an acre, to be paid to the said Company."

If the purpose of the proviso of 1869 was to give to the Railroad Company only the proceeds of the land at \$2.50 an acre, and also to provide that all the land of every description should go to persons thereafter claiming that they had become actual settlers, or who had established their rights as actual settlers, this result could have been brought about naturally and effectively by providing for the sale of lands under Government superintendence, or by opening it to homestead entry and providing for the payment of the proceeds to the Railroad Company as aid in constructing the road.

It is a very powerful argument in support of the reasonableness of this construction of the Statute that no grantee was named in the Act of 1866 of the Oregon portion of the grant; that a conflict had arisen as to the corporation qualified to become the grantee by designation of the Oregon Legislature; that a default in filing the assent had occurred which it was the purpose of the Act of 1869 to remedy; that the construction of the road had thus been delayed and that a considerable time would necessarily elapse before it would be completed; that in the meantime the lands might be kept out of the market by withdrawal within the indemnity limits, as the law at that time was thought to permit (*Holmes v. U. S.*, 118 Fed. 995. The previous ruling to that effect was reversed in *Hewett v. Schultz*, 180 U. S. 139; *Southern Pacific R. Co. v. Bell*, 183 U. S. 675).

To preserve the right of entry on the land for settlement and cultivation, as well as to secure the prompt completion of the railroad and telegraph lines, it would be reasonable to require, as this proviso does require, that the Railroad Company should sell lands to persons becoming actual settlers and acquiring a settlement before title was ultimately fixed.

To the arguments in support of this construction of the proviso, the Government replies that such construction would practically defeat the purpose for which the proviso was intended,—namely, to devote the lands to future settlements in small tracts. But this contention appears to beg the question, which is whether Congress intended to devote the lands to future settlement, or whether it intended simply to protect those persons who were on the land at the time the grant should take effect.

Considerable attention is given in the opinion on the demurrer by the Court below to a consideration of the history, policy and purposes of the general Government in its control, administration and disposition of the public domain. The learned counsel for the Government in their argument addressed to the Court upon that subject treat the inauguration by the Government of the bestowal of public lands to aid in the construction of railroads as a temporary abandonment of what they designate as “the settler policy.” In this they are mistaken. The public lands in Iowa and the States which were carved out of the Territory of the Northwest, in-

clude a vast area of prairie lands easily accessible for settlement and fit for cultivation. The same thing a little later was known to be true of Nebraska and Kansas, but the fate which overtook many of the wagon trains and cattle of settlers and their families who travelled the trail across the plains to find homes in the Far West, from attacks by Indian tribes, and the slowness of the methods of travel at that time, and the hardships entailed thereby, together with the fact that the only other method of getting from coast to coast was around Cape Horn, made it not only a matter of national military policy, but in the interest of settlement and development of the great region beyond the Mississippi, that there should be connection by rail between the eastern and western coasts. In every grant of public lands by the Government to aid in the construction of railways, there is found undoubted evidence of the solicitude of Congress that the settlement of the public domains should be facilitated as one of its paramount purposes for each reserve of the ungranted sections within the land grant limits for settlement in tracts not exceeding 160 acres as did the Union Pacific grant and the grant of 1866. The construction of the railways aided by land grants facilitated settlement on the ungranted sections and the public lands generally, by affording easy access to them, and not only that, but it enabled the Government to protect settlers from the Indians and enabled and encouraged settlers to improve the land, increase their cattle and multiply their agricultural products by affording them opportunities for transportation to markets which they otherwise could not reach.

While securing to persons actually upon the land their rights in the land, the policy of Congress was to open up and develop the new country and secure its settlement and prosperity, and it was thought that this could be best effected by giving to the Railroad Company absolute title and right of disposal of such lands as Congress might deem it advisable to grant. In no railroad grant had Congress attempted to restrict the absolute power of disposal, except in favor of persons who were actually upon the land.

The Counsel for the Government have dealt at length in their brief with the Congressional debates affecting the restriction of land grants, but these debates are not competent as a means of interpreting the proviso of 1869. (*U. S. v. Trans-Mississippi Freight Assn.*, 166 U. S. 318; *Lapina v. Williams*, Commissioner of Immigration, 232 U. S. 78, citing *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 318; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 463; *Binns v. U. S.* 194 U. S. 486; *Johnson v. S. P. Co.*, 196 U. S. 1, 19.)

If the proviso shall be construed as limited to persons who are actually in possession of the land granted at the time the grant became effective, that will be the end of the plaintiff's case—for, whether the proviso be regarded as a covenant or as a condition, there is no evidence that the Railroad Company at any time failed to sell to a person in actual possession at the time the grant took effect, upon the terms named in the proviso.

But if this construction of the proviso be rejected, the plaintiff's case stands in no better condition, unless

the Court shall also reject the construction of the proviso limiting it to lands susceptible of actual settlement.

(b) If we assume that the proviso is to be given a prospective construction, and that Congress intended the Railroad Company should provide by some suitable form of conveyance, or otherwise, that the lands should pass only into the hands of actual settlers, there is a necessary inference that the lands referred to should be susceptible of actual settlement and cultivation.

The proviso either cut down the grant to such lands as were susceptible of cultivation, and so amounted to a repeal, by implication, of the Act of 1866, *pro tanto*, or else, lands not susceptible of cultivation were exempted from its operation.

It is not possible to adopt the former of these alternatives, because there is nothing in the Act of 1869 to indicate an intention to cut down the grant made by the Act of 1866. On the other hand, the Act of 1869 authorized the filing of the assent and provided that "such filing of its assent shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act." We must, therefore, accept the other alternative, to wit: that lands unfit for cultivation were excepted from the operation of the proviso.

Moreover, if the Pre-emption, Donation and Homestead Laws be taken as the best indication of Congressional intent in enacting the proviso of 1869, it is plain that the intent was that only lands susceptible of settlement and cultivation should come within its operation.

The Donation Law by its terms applied only to lands fit for cultivation. The Pre-emption and Homestead Laws were necessarily applicable only to such lands, because no one, in good faith, could procure a patent under either of those laws without proof of actual residence, occupancy and cultivation of the soil. "What is implied in a statute is as much a part of it as what is expressed."

United States v. Babbitt, 1 Black. 55.

Gelpecke v. Dubuque, 1 Wall. 220.

Wilson Co. v. Third Nat. Bank of Nashville, 103 U. S. 770.

Wood Co. v. Lackawanna Iron Co., 93 U. S. 619-624.

The term "actual settlers" used in those laws, has often been defined in the reported decisions. Thus:

"An actual settler upon the land is one who has actually established his residence upon it, and not one who has enclosed it and cultivated it intending at some future time to live upon it. The use of the word 'actual' would seem to be intended to prohibit the Courts from extending the meaning of the word 'settlers' by construction, and to confine the benefits of the provision of the law to those only who come within the literal meaning of the term."

Baker v. Millman, 77 Texas, 46.

Again—

"An actual settler upon land belonging to the State, is one who establishes himself upon the land

or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquiring title to it by purchase from the State.”

Gavit v. Moore, 68 Calif. 506.

Again—

“The policy of the Homestead Act, no less than the specific statement of the filed oath, looks to a holding for a term of years by the actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none other, homesteads have been freely granted by the Government.”

Adams v. Church, 193 U. S. 510.

Again—

“Actual settlers within the land laws of California, providing that lands belonging to the State which are suitable for cultivation, can only be granted to actual settlers thereon, means actual residents.”

Mosely v. Torrence, 71 Calif. 318.

Again, Constitution, Texas, Article VII, Section 6, provides:

“ ‘That actual settlers residing on school lands shall be protected in the prior right of purchasing the same’. This means a settler residing on the land, and not a settler not residing thereon, though

he had fenced the entire tract and cultivated a portion thereof."

Baker v. Millman, 77 Texas, 46.

These definitions of the term "actual settler" exclude the possibility of using it in connection with lands which are incapable of actual settlement and cultivation.

As indicating the favor with which the Government looks upon actual settlers, the Court below quotes from the opinion in the case of *Clements v. Warner*, 24 How. 394, 397, as follows: "Later statutes enlarged the privilege of pre-emption so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers." But the Court in the same connection notes the limitation inherent in the idea of actual settlement. It proceeds in its opinion as follows:

"No act of Congress has defined the meaning of the term 'reserve' as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands *fitted for agricultural purposes*, after they have been offered at public sale, *are affected by the privilege of the actual settler* to have the preference of entry."

And in the remarks of Mr. Julian quoted in the opinion of the Court below (page 775) referring to the purpose of an amendment which he had moved to the Denver Pacific bill precisely similar to that here in question,

he says: 'This will avoid the complete monopoly of the lands as sanctioned by the old system of land grants, and at the same time *devote to settlement and tillage* the odd numbered sections granted.'

As bearing upon the intention of Congress in passing the Act of 1869, it is well to note that in the land states and territories there were then 1,338,113,646 acres of land unsurveyed, and 496,884,751 acres of land which had been surveyed. Of the lands which had been surveyed, almost all of them were in the non-mountainous, untimbered, agricultural country. In the great timber states of California, Nevada, Oregon, Washington, Idaho, Montana and Wyoming, there were 518,347,021 acres of unsurveyed land, and only 39,499,970 acres of surveyed land, two-thirds of which were in the State of California. Since the Pre-emption and Homestead Laws were applicable only to surveyed lands, it is apparent that at that time they had no application to the densely timbered, mountainous districts of the Pacific Coast.

The predicate of *an* actual settler is land capable of actual settlement. The supposition that Congress intended that the Railroad Company should be obligated to sell lands incapable of actual settlement to actual settlers, is utterly unreasonable and excludes serious discussion.

But what lands are susceptible of actual settlement and cultivation? Much of the land granted was heavily timbered; much of it was inaccessible. Some of it was so mountainous and broken as to be plainly not susceptible of cultivation. Of the timbered lands, some of

them, after the timber had been removed, might be susceptible of cultivation, and others of them not. What lands then, did Congress have in mind when it required the Railroad Company to sell them to actual settlers for purposes of "settlement and tillage?" We think it is only reasonable to suppose that the statute did not refer to the probabilities of the future, but to the facts of the present, and that those lands which were naturally adapted and ready to be taken up for habitation were within the purview of the proviso, while those which were not fit for cultivation, but were chiefly valuable for their timber, were not within its operation.

What Congress had in mind as within the operation of this proviso, we think, is made manifest by subsequent legislation.

- (3) When timbered lands had been surveyed and became valuable for the timber, it was found that they were not adapted to entry under the Pre-emption or Homestead Laws, because not valuable, or not chiefly valuable for cultivation.

From 1869 to 1877, the disposition of public lands by auction sale, and of offered lands at private sale, fell into general disuse, and except in certain special instances the public lands could be acquired only under the Pre-emption and Homestead Laws. No attempt had been made to classify the public lands, or to provide particular methods for the disposition of particular classes of lands, except so far as such classification was inherent in the Pre-emption and Homestead Laws by reason of the requirement of settlement and cultivation.

To this statement, however, there should be made an exception of mineral lands. The discovery of gold in California in 1848 led to the adoption of a special statute as to mineral lands which was passed July 26, 1866 (14 Stat. 251). Previous to the enactment of that statute, owing to the fact that the lands in which the precious metals were found were unsurveyed and not opened by law to occupation and settlement, the taking up of mineral lands was controlled by a system of local rules and customs, which were recognized and received the sanction of law in the Act to which reference has been made. (See opinion of Mr. Justice Field in *Jennesson v. Keik*, 98 U. S. 453). In the meantime, the construction of the Union Pacific Railroad and the Northern Pacific Railroad opened up vast tracts of timber lands in other parts of the country, but conspicuously in the Pacific States of California, Oregon and Washington. Immigration followed the construction of the railroads. Before 1878 the Oregon and California Railroad had been extended from Portland, south, a distance of nearly 197 miles. In Oregon, as well as in the more easterly States of Wisconsin, North Dakota and Montana, successful attempts had been made to enter timber lands under the Pre-emption and Homestead Laws, although such entries, where the lands were chiefly valuable for timber, were generally fraudulent. In other portions of the country the tide of immigration had reached the desert lands, and upon these also no entry could in good faith be made under the Pre-emption and Homestead Laws.

The attention of Congress had been called to this situation; a special law providing for the acquisition of desert lands was passed March 3, 1877 (19 Stat. 377). Timber lands were made the subject of special study.

In the report of the Secretary of the Interior for 1877-8, a report to him of J. A. Williamson, Commissioner of the Land Office, was submitted, which stated, among other things, as follows:

“It is a fact which cannot be successfully denied, that most of the pine lands in Michigan, Wisconsin and Minnesota, also those on the Pacific Coast, have very little value as agricultural lands and should be withdrawn from the operation of the Homestead and Pre-emption Laws. Millions of acres have been taken under these laws which contemplate settlement and cultivation, whereon now no vestige of agriculture or cultivation exists. These laws are used in the pine land portion of the country mainly as covers for fraud.”

Consequently he recommended that Congress should, by proper legislation, withdraw all lands chiefly valuable for pine timber from the operation of the Homestead and Pre-emption Laws, and from all manner of sale and disposition, except for cash, at a fair appraised value, to be ascertained in such manner as Congress should provide under direction of the Secretary of the Interior. He added:

“As the law now is, men procure title by swearing to a compliance with the laws requiring cultivation. The Homestead and Pre-emption Laws

are now educating thousands of men in the crime of perjury. It would be better to pass a law granting the land to the persons who would manufacture the timber upon it into lumber, railroad ties and charcoal, as that is in fact what they do, and all they do now, after taking them under the Homestead and Pre-emption Laws. I would recommend that the Homestead and Pre-emption Laws be so amended as to be applicable only to arable agricultural lands, and in no case to lands *chiefly valuable for the timber growing upon it.*"

A commission was appointed by Congress (Act of March 3, 1879) consisting of the Commissioner of the Land Office, the Director of the Geological Survey and three civilians appointed by President Hays—Carl Schurz being then Secretary of the Interior. The Commission said, among other things, as follows:

"In the case of timber lands, the position of the settler with respect to the laws is practically anomolous. * * * A very great proportion of the lands of the West cannot become settled and pass into private ownership because, under the terms of existing laws, it is not desirable to the settler to acquire them."

"These difficulties have, in the main, grown up out of the want of adaptation to the present public domain of the laws which were originally framed for the Northwest Territory. In the latter region nearly all the land had a value fully equal to the price which the Government put upon it at the

time it was first opened for settlement, and so far as natural advantages and the value arising from natural causes, as distinguished from artificial, are concerned, one acre of that region was about as valuable as another. There was a kind of homogeneity in the quality and value of that region. It was all valuable for agricultural habitation. But in the northwest portion of our country, it is otherwise. Its most conspicuous characteristic, from an economic point of view, is its heterogeneity. One region is valuable exclusively for mining, another solely for timber, a third for nothing but pasturage, and a fourth serves no useful purpose whatever. The very small proportion which is capable of agriculture must, in the greater part of the West, be irrigated in order to yield a crop. Hence, it has come to pass that the Homestead and Pre-emption Laws are not suited under the terms of the conditions attached to them, for securing the settlement of more than an insignificant portion of the country. Hence, too, it has arisen that the want for lands which could not be advantageously acquired under those laws, led to practices not contemplated by the statutes, for the purpose of acquiring them in quantities and at prices more acceptable to occupants, and has even led to their occupation by usurpation of title, or rights which amount to practically ultimate seizure without record or notice."

Again:

"The administration of land affairs in the United States with its system of parceling, method of

survey and modes of disposal, was inaugurated at the time when all the lands were considered as available for agricultural purposes; *that is, all the lands were supposed to be arable.*"

The report goes on to say:

"The most valuable timber in the Territories and in the States on the Pacific Coast grows upon lands possessing very little, if any, value for agricultural purposes. * * * Until the passage of the Act of June 3, 1878, entitled 'An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory,' there was no manner in which timber or timber lands in either of the States or the Territory mentioned, could be obtained, except by settlement under the Homestead and Pre-emption Laws; and by the location of certain kinds of scrip and additional homestead rights which cost several dollars per acre."

"Settlements upon timber lands in the States and Territory mentioned in the Act under the Homestead and Pre-emption Laws, are usually a mere pretense for getting the timber. Compliance with these laws in good faith where settlements are made on lands having timber of commercial value is well nigh impossible, as the lands in most cases possess no agricultural value, and hence, a compliance with the law requiring cultivation is impossible."

The Act referred to above, which is known as the Timber & Stone Act (20 Stat. 89) provided in sub-

stance that the surveyed public lands 'valuable chiefly for timber, but unfit for cultivation,' might be sold in quantities, not exceeding 160 acres to any one person, or association of persons, at the minimum price of \$2.50 per acre. A person desiring to avail himself of the act was required to file with the Register of the proper district a statement designating by legal sub-division, the particular tract of land he desired to purchase, setting forth the same as *unfit for cultivation and valuable chiefly for its timber and stone*; that it was *uninhabited* and contained no mining or other improvements, except as specified; that the applicant had made no other application under the act, and did not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made an agreement or contract in any way or manner with any person or persons whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. A notice of this application was to be posted and advertised, and upon proof of notice and advertisement, and that the land *was of the character contemplated in the act, unoccupied and without improvements other than those excepted*, and that it contains apparently no valuable deposits of the minerals specified, and upon payment of the purchase money, the applicant might be *permitted to enter, and a patent might issue*.

The true interpretation and effect of this Act was stated by Justice Brewer in *U. S. vs. Budd* (144 U. S. 145) in these words:

“With regard to the second question: The description in the Act is of lands ‘valuable chiefly for timber, but unfit for cultivation.’ It is conceded that these lands were valuable chiefly for timber. It is claimed, however, that they were fit for cultivation, and therefore not within the description of lands purchasable under this Act. But obviously at the time of the purchase the land was unfit for cultivation. It was covered with a dense growth of timber; fir trees, many of them two hundred feet in height and five feet in diameter. In respect to the testimony the trial court makes this comment:

“ ‘Thirteen witnesses were called who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall and straight, and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre, and this testimony and estimate is not controverted. The field-notes made by the government surveyor at the time of surveying the land, more than twenty-five years ago, describe the land as being stony and second rate, and the timber as fir, cedar and hemlock, and the most convincing testimony of all is a series of twelve photographs taken near the centers of each legal subdivision of the

tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that *no man would be willing to subjugate this piece of forest for the mere sake of cultivating it.*'

"If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is that the statute does not contemplate what may be, *but what is. Lands are not excluded by the scope of the Act because in the future by large expenditures of money and labor, they may be rendered suitable for cultivation.* It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming lands; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on the land brings it within the scope of the Act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a

dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.' ”

It was the established practice under this act to fix the price of the lands at \$2.50 per acre, and this continued to be the practice until the regulations of the Land Department, approved November 30, 1908, and revised and approved August 22, 1911, by which, among other things, the character of the lands covered by the act were defined as follows:

“Lands valuable chiefly for timber, but unfit for cultivation, *are lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase*, and, therefore, include lands which could be *made more valuable for cultivation by cutting and clearing them of timber*. The relative values for timber or cultivation must be determined from *conditions of the land existing at the date of the application to purchase*.

The amended regulations provide for an appraisal of the land after examination and of the timber upon the land, and the land is to be sold upon this appraisal, but at not less than \$2.50 an acre.

It has been held by the Commissioner of the Land Department that the Commissioner had jurisdiction to make these regulations (Verinda Venson, 39 L. D. 449).

As defined by the amended regulations, the Timber & Stone Act applied to lands *chiefly valuable for timber*, even though *after being cleared they could be made more valuable for cultivation*, and that they were subject to sale at the appraised, that is, at *their actual value*. It is thus determined that such was the meaning and scope of the act at the time of its enactment. We have thus a Governmental construction of the policy of the Government with reference to timber lands when *attention was called to the working and effect of the Pre-emption and Homestead Laws in the disposal of timber lands*.

- (4) It was the intention of Congress that the Pre-emption and Homestead Laws should apply only to lands susceptible of cultivation, and that lands chiefly valuable for timber should be sold at their actual value. This intention having been to a considerable extent, defeated by the administration of these Acts, Congressional intention was emphatically declared by subsequent legislation.

A message was submitted to Congress by President Roosevelt accompanying the second partial report of the Public Lands Commission appointed October 22, 1903, to report upon the condition, operation and effect of the then land laws, and to recommend such changes as were needed to effect the largest practical disposition of the public lands to actual settlers who will build homes upon them, and to secure in permanence the fullest and

most effective use of the resources of the public lands. In that report the Commission said:

“In our preceding report reference was made to the fact that the present land laws do not fit the conditions of the *remaining public lands*. Most of these laws, and the departmental practices which have grown up under them, were framed to suit the lands of the *humid region*. It is evident that the decisions often contemplate conditions such as prevail in the *Mississippi Valley and Middle West*. * * * In short, the precedents established, and which now have practically the force of law, have so completely modified the apparent object of the original statute, that the *statute* and the *prevailing conditions appear to be wholly unconnected*.”

Referring to the Commutation Clause of the Homestead Act, the following language was used:

“A careful examination of the districts where the Commutation Clause is put to the most use, shows that there has been a rapid increase in the use of this expedient for passing public land into *the hands of corporations or large land owners*. The object of the Homestead Law was primarily to give to each citizen, the head of a family, an amount of land up to 160 acres, *agricultural in character, so that homes could be created in the wilderness*. The Commutation Clause added at a later date was undoubtedly *intended* to assist the honest settler, but like many other *well intended acts*, its original intent has been gradually perverted, until now it is

apparent that a *great part of all commuted homesteads remain uninhabited*. In other words, under the Commutation Clause the *number of patents* furnishes no index to the *number of new homes*."

Further comment is made for the purpose of showing to what extent the administration of these laws had departed from the original intention.

Referring to grazing lands, the report proceeds:

"The great bulk of the vacant public lands throughout the West are *unsuitable for cultivation under the present known conditions of agriculture*, and so located that they cannot be reclaimed by irrigation. They are, and probably always must be, of chief value for grazing. There are, it is estimated, more than 300,000,000 acres of public grazing land, an area approximately equal to one-fifth the extent of the United States proper. * * * There are also vast tracts of wooded or timbered lands in which grazing has much importance, and until a further classification of the public lands is made, it will be impossible to give with exactness the total acreage."

In the message to Congress under date of June 22, 1909, in connection with the report of the National Conservation Commission, President Roosevelt said:

"The remaining public lands should be classified and the *arable lands disposed of to homesteaders*. In their interest the Timber & Stone Act and the Commutation Clause of the Homestead Act

should be repealed, and the Desert Land Law should be modified in accordance with the recommendations of the Public Lands Commission."

Referring to the administration of the Timber & Stone Act, the Commission reports as follows:

"It is the opinion of Special Agent, Dixon, after several years' experience and close observation, that comparatively none of the land taken up under the Timber & Stone Act *is utilized for farming or agricultural purposes*. This would appear to be due to two essential causes: First, the Act *makes provision for the taking up of only such lands as are unfit for farming*. Second, where lands are *covered with an excessively heavy growth of timber, farming is precluded by reason of the great cost attending the putting of such lands in the state of cultivation.*"

Referring to the Homestead Act, the Commissioners say:

"From a careful study of this Act, it would appear that the primary idea and object of Congress in passing this free Homestead Act, was to give to each needy citizen who was the head of a family, 160 acres of land, *agricultural in character*, in order that industrious farmers would take the place of the beasts and wild animals inhabiting the plains, and agricultural lands owned by the public through the general Government; that farms would spring up among the hitherto deserted lands, once

the home of the savage, and that thriving and industrious communities might be established where none then existed."

The report then refers to the Commutation Clause of the Homestead Act and gives in considerable detail the results of investigation, with the conclusion at which the Commission arrives, namely, that 90 per cent of those making Commutation entries within the timber and mineral belts are from *walks in life where agriculture is not understood, nor desired*, and that entries are made for the purpose of immediate *transfer and speculation*. The result of the reports of this Commission was the enactment of the enlarged Homestead Law of 1909.

That Act provided that

"Any person who is a qualified entryman under the Homestead Laws of the United States, may enter by legal subdivisions under the provisions of this Act in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington and Wyoming, and the territories of Arizona and New Mexico, three hundred and twenty acres, or less, of non-mineral, non-irrigable, unreserved and unappropriated surveyed public lands, *which do not contain merchantable timber*, located in a reasonably compact body, and not over one and one-half miles in extreme length."
(Laws of 1909, C. 160, 35 Stat. 639.)

By the fourth section of this statute it was provided that in making final proof in addition to the proofs required under the Homestead Law, it should be shown by

two *credible* witnesses that at least *one-eighth* of the area embraced in the entry was *continuously cultivated in agricultural crops other than native grasses*, beginning with the second year of the entry, and that at least *one-fourth* of the area embraced was so continuously cultivated beginning with the *third year* of the entry. By an amendment adopted in 1913 (37 Stat. 666) the minimum acreage which was to be shown to be cultivated was reduced to *one-sixteenth* for the second year, and *one-eighth* for the third year.

By the Law of June 6, 1912, (37 Stat. 123) the original Homestead Law was amended by reducing the time at the expiration of which a patent could issue to three years, and requiring proof of *cultivation of not less than one-sixteenth* of the area *beginning with the second year*, and *one-eighth* beginning with the *third year*. It was also provided that upon proof that the entrymen had failed to establish a residence six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the lands so entered shall revert to the Government. These statutes are of great importance as emphasizing the governmental policy under the Homestead Law as to the entries upon lands which were not naturally and proximately susceptible of cultivation.

The revised rules of the Land Department and the amended Homestead Law are to be read in connection with the decisions of the Courts and of the Land Department in the administration of the Homestead Law and the Timber and Stone Act. In *Johnson vs. Bridal Veil Lumber Company*, 24 Ore. 182, it was held that the

fact that a tract of land might be acquired under the Timber and Stone Act, did not preclude the possibility of its being acquired under the Homestead Law. The Court said:

“It might be said that a Homestead claimant who desired such a tract for a home and agricultural purpose had not exercised very good judgment in his selection, but *if he could grow crops thereon*, he would be entitled under the law to make his final proof and receive his patent. His right to make final proof and obtain a patent *rests upon his cultivation of the soil*, and not upon *the exercise of his judgment in the selection of his homestead.*”

The result of this and similar rulings of the Land Department (Patten vs. Quackenbush, 35 L. D. 56; Raleigh vs. Hayes, 29 L. D. 506; Porter vs. Throupe, 6 L. D. 691) tended in some instances to a lax enforcement of the Homestead Law, which was likely to continue so long as under the Timber and Stone Act the timber lands could be acquired at the same price at which they could be acquired under the Commutation Clause of the Homestead Law. The Commissioners of the Land Department were not unconscious of the difficulty which attended the overlapping of the Timber and Stone Act and the Homestead Law, by permitting entries of timber land under the Homestead Law. An illustration is found in the case of Finley vs. Ness, 38 L. D. 394. The Court said:

“Lands covered with valuable timber may nevertheless be entered under the Homestead Law

where the character of the land is such that it would be suitable for agricultural use if the timber were removed. (See *Jones vs. Aztec Land & Cattle Co.*, 34 L. D. 115; *Patton vs. Quackenbush*, 35 L. D. 561;) but land not adapted to any agricultural use, is not subject to homestead entries. (See *Davis vs. Gibson*, 38 L. D. 265.) The character of the land here involved, as shown in the record, is fairly stated in the opinion of the local office above given, to-wit: At the hearing the contestant introduced the testimony of three witnesses of creditable appearance whose testimony is no may impeached, to the effect that land which claimant now proposes to enter for agricultural purposes, and which her mother in her application has stated as unfit for cultivation and chiefly valuable for timber, is in fact of a steep, mountainous character and heavily timbered, and does not contain to exceed one-half an acre that could be considered as suitable for cultivation. And that even this small fraction could not be cultivated until cleared of timber and brush. One of these witnesses estimated that the land carries 9,000,000 feet of saw timber, while another says it contains 8,000,000 or 9,000,000 feet. One of these witnesses, an experienced farmer, says that the soil is thin, poor and absolutely unfit for cultivation, even if cleared of the timber. Claimant seeks to meet this showing by his own unsupported testimony to the effect that a considerable portion of the land could be prepared for grazing purposes

without great expense or clearing, and that his intention is to establish his home upon the land and engage in the dairy business.”

The Commissioner supported the ruling of the Register of the Land Office refusing the patent.

So it was held that if the land could not be adapted to any agricultural use, there could be no valid entry of it under the Homestead law (Davis vs. Gibson, 38 L. D. 265), and that since the Homestead law requires *cultivation* of the land, that where land is so mountainous, rough, broken and heavily timbered and of such poor quality that it is impossible to cultivate it, it is not subject to Homestead entry. (Wilminghoff vs. Ryan, 40 L. D. 349.)

In order to give harmony and distinctness to the enforcement of the Homestead entries of timber lands and the Timber and Stone Act, the revised rules of the Land Department of 1908 were adopted and the enlarged Homestead law was passed.

But these were not departures from the original land policy which had dictated the Pre-emption and Homestead laws. They were the legislative declaration of the Governmental intention as expressed in those laws. They defined and emphasized that intention by relieving that policy from any misapprehensions which might arise from their construction and administration by the courts or the Land Department. They placed it beyond doubt that the policy of the Pre-emption and Homestead laws extended only to lands susceptible of cultivation and residence; that they did not extend to heavily timbered lands chiefly valuable for timber, and which,

even if the soil were susceptible of cultivation, could be availed of for agricultural purposes only when the lapse of time and industrial development had rendered the timber of a value greatly in excess of the value of the soil.

There could be no more convincing evidence that at the time the Act of 1869 was passed, the policy of the Government with regard to the disposition of the public lands was that agricultural lands only, that is, lands immediately susceptible of cultivation, were to be donated to actual settlers upon the terms of settlement and cultivation, than the subsequent legislation of Congress upon this subject.

We are at liberty to refer to this subsequent legislation for the purpose of construing the proviso attached to the grant.

In *Endlich on Construction of Statutes* (Section 354, Am. Ed.), it is said:

“A legislative grant is indeed like any other legislative enactment to be construed, if possible, so as to effect the intent of the grantor; if that intent is doubtful under the statute making it, the rule of construction recognized as applicable, requires the doubt to be resolved against the grantee in favor of the public, *or, in analogy to another principle of statutory construction, is to be such as will make it accord with subsequent legislation.*”

In *Cope vs. Cope* (137 U. S. 682), in construing certain statutes, the Supreme Court said:

“These several acts of Congress, dealing, as they do, with the same subject matter, should be con-

strued not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones." Citing *U. S. vs. Freeman*, 44 U. S. 3 How. 556; *Stockdale vs. Atlantic Ins. Co.*, 87 U. S. 20 Wall. 323.

And in *Tiger vs. Western Investment Co.*, 221 U. S. 286-308, the same Court said:

"When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."

If, as we have formerly shown, sales to actual settlers are necessarily limited to lands susceptible of actual settlement, then it becomes necessary to define what is meant by lands susceptible of actual settlement and cultivation. When applied to a particular quarter section, it is evident that the phrase does not necessarily define itself. There is room for a wide diversity of interpretation between a quarter section, the entire surface of which is barren rock, and a quarter section, the entire surface of which is alluvial soil. There are great differences between the present uses to which lands can be put and those to which they can be put under opportunities for scientific farming with a condensed and congested population. A quarter section of land which might be regarded as fit for actual settlement and cultivation in China, might not be regarded as fit for actual

settlement and cultivation in the new, undeveloped forest lands of Oregon. A quarter section covered with dense timber, inaccessible to a sawmill, although many years after when the trees had been removed and the stumps extracted it is found to be susceptible of settlement and tillage, might not be so regarded in its original state, and before facilities to open it to husbandry were at hand. The words of the proviso are, therefore, open to interpretation, particularly in view of the varying decisions in the Land Office as to what constituted settlement and cultivation under the Homestead and Pre-emption laws, and in view of the reports of the Commissions to which we have referred and the Congressional legislation following.

This, as it seems to us, is precisely the instance in which we may look to subsequent legislation for the purpose of ascertaining the intention of Congress in enacting this proviso.

- (5) If the scheme of the proviso of 1869 was that the granted lands were to be disposed of by the Railroad Company in analogy to the manner in which similar lands were disposed of by the Government, then timber lands were not within the purview of the proviso.

The Government has contended that the only possible purpose of the proviso was to subordinate the grant to the general public land policy of the United States. (Mr. Townsend's brief, page 195). And the learned judge who wrote the opinion on the demurrer, devotes considerable space to the discussion of the early land

laws, for the purpose of showing the policy of the Government to favor actual settlers in the disposition of the public lands. We concede that such was the policy of the Government, but we insist that that policy was from its very nature and character confined to lands which invited settlement and home-making, and that when it was found that this acknowledged policy was being perverted so that lands not attractive for settlement and home-making were being fraudulently acquired for purposes of speculation and for the sale of the merchantable timber upon them, Congress undertook to defeat this perversion of the Governmental policy, and to restrict the operation of the earlier statutes to the lands to which they were intended to apply. Counsel for the Government in their brief upon the demurrer, remark:

“Let us, therefore, observe whether Congress imposed similar restrictions as to the permanent disposition of the intervening lands of the Government. In other words, let us see if the restrictions placed upon the railroad company by the Act in question bear any resemblance to similar restrictions imposed upon the United States itself as to the disposition of the adjacent public lands, because it is manifest that Congress must have been just as serious in establishing laws as to the disposition of the odd numbered sections in Western Oregon, as with reference to the disposition of the even numbered sections.” (Mr. Townsend’s brief, page 396.)

We have in this case a most forcible illustration of the mode in which the Government dealt with the reserved even sections within the grant. In the Act of 1870 (the West Side Grant), it is expressly provided that upon the withdrawal of the odd sections included in the grant from sale, "thereafter the remaining public lands subject to sale within the limits of said grant, *shall be disposed of only to actual settlers*, at double the minimum price for such lands." How did the Government in point of fact dispose of the timbered even sections within the grant? Did it dispose of them under the Homestead law to actual settlers? A reference to the map offered in evidence by the defendants (Exhibits Nos. 263 and 264, pages 6704 and 6705), shows that the lands colored yellow on map No. 263 indicate the lands taken up under the Timber and Stone Act, or other non-settlement entries. It will be observed that the Government had no hesitation in disposing of the timbered lands in the even sections to persons other than actual settlers, although by the Act of 1870 there was the express direction that such lands should be sold to actual settlers only. The Government thus placed a construction upon these words which limited their application so as to exclude lands, chiefly valuable for timber, and unfit for cultivation, as defined under the Timber and Stone Act.

Following the analogy of the land laws, we must conclude that Congress never intended that timber land should be sold at not *more* than two dollars and a half per acre, for the first expression of its policy (Timber and Stone Act) as to the disposition of such lands was

that they were to be sold at *not less than* \$2.50 an acre. What reason, then, is there to suppose that by the proviso of 1869 Congress meant to express any other intention? In the disposition of the public land Congress has never intended to make benefactions to favored persons. The settlement laws were intended as aids to home-makers, who, if they were such in good faith, made ample returns by their toil and privation in opening up new territory for any governmental benefit which they received. Not so, however, as regards timber lands. As soon as the timber acquired a merchantable value, governmental timber lands passing into the hands of individual owners carried with them not only the land itself but the immediate, convertible, cash value of the timber. Unless paid for at its value, the timber thus acquired would be a pure benefaction, for which the public received no return whatsoever.

The proviso in the Act of 1869, as we have said, referred only to lands susceptible of cultivation and not chiefly valuable for timber. This was the limit of restriction which Congress intended to place on the grant. In so doing it followed the governmental policy as it had been expressed up to that time and as it was subsequently expressed, grants in aid of public improvements having in no instance, as far as we know, previous to 1869 been restricted in the extent or mode of disposition of the lands granted. When in 1869 such a restriction was placed upon this grant and upon the grant to the State of Oregon for a wagon road from Roseburg to Coos Bay and in the extension of the grant to the State

of Alabama, there was no indication of any intention to depart from the policy of the government in the disposition of timber lands.

- (6) The construction placed upon the proviso by the Land Department and other officers of the Government for many years was that it did not apply to timber lands, or lands not susceptible of cultivation.

In 1878 Congress passed an act approved June 19, 1878, to create an auditor of railroad accounts, whose duties were, among other things, subject to the direction of the Secretary of the Interior, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are, in whole or in part, west, north or south of the Missouri River, and to which the United States has granted any loan of credit or subsidy in bonds or lands; *to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any reports received from them. . . . To see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariffs for freight and passengers and in regard to the accounts of said railroad companies, as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interests of the Government; and to make an annual report to the Secretary of the Interior on the first day of November on the condition of each of said railroad companies, their*

road accounts and affairs for the fiscal year ending June 30 immediately preceding. Said act also provided:

“Section 4. That each and every railroad company aforesaid, which has received from the United States any bonds of the said United States issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States *any lands granted to it for a similar purpose*, shall make to the said Auditor *any and all such reports as he may require from time to time*, and shall submit *its books and records to the inspection of said Auditor or any person acting in his place and stead*, at any time that the said Auditor may request, in the office where said books and records are usually kept, and the said Auditor or his authorized representative, shall make such transcripts from the said books and records as he may desire.”

A failure or refusal to submit its books and records for such inspection was made enforceable by a forfeiture of a sum not less than \$1,000 or more than \$5,000, to be recovered for the use of the United States.

Pursuant to this act each year, from the time of its passage until June 30, 1902, when the office terminated, and the records and files of the office were transferred to the Secretary of the Interior, the Auditor of Railroad Accounts whose official designation was changed in a year or two to “Railroad Commissioner,” visited the various bond and land aided railroad companies southwest and north of the Missouri River, *among them this*

defendant, Oregon and California Railroad Company, charged with the duty of examining into its accounts, including the administration and details of its land department, and with the duty to see that the laws relating to the said companies are enforced. The office was held during the period between the passage of the act and its termination by law on the 30th day of June, 1912, by several distinguished gentlemen, including General Joseph E. Johnson and General Longstreet. The Auditor of Railroad Accounts required from the *defendant* company, as he did from other land grant companies, *semi-annually, a report for the year ending December 31, 1879, and semi-annually thereafter, showing inter alia* the maximum and minimum price per acre from sales, and also the maximum and minimum price per acre asked at the date of each report. The reports made by the railroad company to the Railroad Commissioner are set forth in the stipulation of facts, subdivision XXI, Item 8, pages 1594 to 1611.

These reports show that there were sales made in excess of \$2.50 an acre continuously, and that the maximum price per acre asked at the dates of the several reports was in excess of \$2.50 an acre. The average price per acre for all sales to date did not exceed \$2.50 per acre previous to December 31, 1887, when it was \$2.51; for December 31, 1888, it was \$2.58; for June 30, 1889, it was \$2.64; for June 30, 1890, it was \$3.14; for June 30, 1891, it was \$3.33; for June 30, 1892, it was \$3.61; for June 30, 1893, it was \$3.66; for June 30, 1894, it was \$3.63; for June 30, 1895, it was \$3.40; for June 30, 1896, it was \$3.40; for June 30, 1897, it was

\$3.40; for June 30, 1898, it was \$3.41; for June 30, 1899, it was \$3.75; for June 30, 1900, it was \$3.77; for June 30, 1901, it was \$4.07; for June 30, 1902, it was \$5.00; for June 30, 1903, it was \$4.73.

The Bureau of the Interior Department made annual reports to the Secretary of the Interior, as required by the Act, which reports were embodied in the annual reports of the Secretary of the Interior, transmitted by him to the President of the United States, and by the latter to the two houses of Congress, and the Secretary's annual report was there referred to the appropriate committees and printed as executive documents (Stipulation, Subdivision XXI, Item 10, page 1612). A resume of these reports is set out in the stipulation of fact (subdivision XXI, item 11, p. 1612.)

The Commissioner of Railroads appended to several of the reports a copy of the Acts of July 25, 1866; April 10, 1869, and May 4, 1870.

Mr. S. S. Mar, law examiner of the General Land Office since May 1, 1877, Railroad Division, and Chief of Division from 1897 to 1908, described in detail the method of keeping the books and records of the Department, and Mr. J. F. Casey, employed in Division F of the Land Office, testified as to the course of business in that office, the former particularly with reference to passing upon the list and selection of lands and the examination prior to the issuing of the patents (1861-1884). He was permitted to testify that the Railroad Division did not consider or determine the question whether any of the conditions subsequent annexed to the grant had

been violated. He said this was because they had already determined that the land passed under the grant. He says that after the company got its patent then this condition subsequent required it to do so. Now, that was a matter we did not pay any attention to. He says that along in the early eighties, when there was a question as to their looking to the forfeiture of this grant, we (the officers of the Land Department) were *directed then not to issue patents under railroad grant where the road had been constructed after the time prescribed in the law when it should be constructed*. That was afterward set aside, for anyhow, we were directed to go on and issue these patents for the reason that we had no right to do anything else. After the road was constructed, that was.

We contend that these facts afford in the most concentrated form, the foundation upon which we are entitled to invoke the established doctrine of contemporaneous and long continued practical construction by the officials of the Government, whose duty it was to administer the grants, and settle the construction adversely to the contention of the Government in this suit.

In *Stewart vs. Laird*, decided in 1803 by the Supreme Court, 1 Cranch 299, the rule was announced in reply to an objection:

“That the Judges of the Supreme Court had no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it

for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not now to be disturbed."

Of course this was a *strong* case, but it was a practical construction of the Act by the judges of the Supreme Court themselves.

In *United States vs. Healey*, 160 U. S. 141, the Court said, in construction of the "Desert Land Act":

"It is said that the administration of this Act by the Interior Department for many years succeeding its passage was upon the theory that 'desert lands' (unless they were timber and mineral lands) included all public lands in the states and territories named that required irrigation—even if they were alternate reserved sections along the lines of land-grant railroads. The object of this suggestion is to bring the present case within the rule, often announced, that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the Department charged with its execution, where that construction has, for many years, controlled the conduct of the public business."

The Court declined to apply the doctrine in that case for the reason that it was obvious that there had been

a change in the statute as well as in the practice, but they say:

“If, prior to the passage of the Act of 1891, the Interior Department had *uniformly interpreted the Act of 1877 as reducing the price of alternate reserved sections of land along the lines of land-grant railroads, being desert lands, from \$2.50 to \$1.25 per acre, we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure.*” (Italics ours). “But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the Act of 1877, without reference to the practice in the Department.”

See also, *United States vs. Moore*, 95 U. S. 760.

In *Fairbank vs. United States*, 181 U. S. 311, the Court quotes from *United States vs. Alger*, 152 U. S. 384-397, in which Mr. Justice Gray, speaking for the Court, used this language:

“If the meaning of that Act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this Court to be perfectly clear, no practice inconsistent with that meaning can have any effect.”

And also once more, Mr. Justice Harlan, in *Webster vs. Luther*, 163 U. S. 331-342, stated the rule in these words:

“The practical construction given to an Act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S. 1-34; *U. S. vs. Healey*, 160 U. S. 136-141. But this court has often said that it will not permit the practice of an executive department to defeat the *obvious purpose* of a statute.”

So also, in *United States vs. the Alabama Great Southern R. Co.*, 142 U. S. 615, where the provision of the statute was that railroad companies whose railroad was constructed, in whole or in part, by a land grant made by Congress on condition that the mail should be transported over their road at such price as Congress should by law direct, should receive only 80 per cent of the compensation authorized by the Act, and it appeared that a railroad company had constructed, partly in the State of Alabama and partly in the State of Tennessee, the portion constructed in Alabama was attained by a grant, but the other portion was not, construction of the statute by the Postmaster General awarding full compensation for transportation over that part of the road unaided, upon which basis payment should be made, was held to be decisive. The Court, by Mr. Justice Brown, said:

“We think the contemporaneous construction thus given by the executive department of the Gov-

ernment and continued for nine years, through six different administrations of that department—a construction which though inconsistent with the literalism of the Act certainly consorts with the activities of the case, should be considered as decisive in this case. It is a settled doctrine of this Court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the face of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive and to require him to repayment of money to which he had supposed himself entitled, and upon the expectation of which he had made his contract with the Government.”

The Railroad Commissioner had access to all the books and accounts of the railroad company and made personal visits of examination. It is conclusively presumed that he faithfully discharged his sworn duty. He was chargeable with knowledge of the facts which appeared in the reports of the company and from its books that some of the lands granted had been sold at a maximum price of \$30 an acre. That timbered lands had been sold in large quantities to timber companies,

and others, who were not and could not be actual settlers within the recognized construction of the Homestead Act.

The mortgage to the Union Trust Company was made in 1887, nine years after the Act appointing the Railroad Commissioner, and after the railroad company had begun to make its semi-annual reports, and had come under the operation of the Act. The Union Trust Company and the persons who purchased the \$17,745,000 outstanding bonds secured by the mortgage of that company, were justified in assuming that the Government acquiesced in and assented to a construction of the proviso of 1869 which authorized the railroad company in selling the lands in the way in which they had been sold.

The bill of complaint alleges that:

“Until the year 1894 there was substantially no demand for the said granted lands, except for the purpose of settlement by persons of limited means able to purchase said lands only in small quantities, and at reasonable prices, and nearly all sales were of that character. During a large part of said period the defendant, Oregon and California Railroad Company, maintained an immigration bureau engaged in inducing immigration and settlement upon said lands, and ostensibly was not otherwise engaged in soliciting or promoting sales. By reason of the premises the occasional violation of the terms and conditions of said land grant occurring during said period were concealed and were gen-

erally unknown until ascertained by your orator as hereinafter stated."

No evidence whatsoever was submitted upon the trial to substantiate the last sentence of this allegation. The rest of the statement is admitted by the answer. It is admitted that approximately 4,930 sales of land were made in quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres (Stipulation, subdivision VIII, Item 5, 1578), and that until about the year 1890 or 1891 there was substantially no demand for granted lands except for the purpose of settlement, or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding \$2.50 per acre, and nearly all sales made prior to the year 1894 were of that character, and to such persons. But the reports show that after 1879 and previous to 1887 lands had been sold during each half year at a maximum price largely in excess of \$2.50 an acre, running from \$15 an acre to \$5 an acre.

It may be said that the railroad company at no time made the claim that there was a distinction between agricultural lands and timbered lands, and that the proviso was limited to the former and did not extend to the latter. But there is not now and never has been any complaint that the railroad company did not sell agricultural lands to actual settlers at not more than \$2.50 an acre, and in quantities not exceeding 160 acres to a purchaser. No question arose between the railroad company and the Government respecting the propriety of its sales of such lands.

The railroad company claimed the right to sell the timber lands in the mode in which it had sold them, and while there was no differentiation of the lands chiefly valuable for timber from those which were chiefly valuable for agriculture, yet practically the demand for the land by purchasers resulted in such a distinction of which the Government had full notice and in which it acquiesced.

The railroad company constructed that part of its railroad extending from Ashland to the southern boundary of the State of Oregon (Stipulation, Subdivision VII, Item 24, 1576), in 1887. Between 1878 and 1887, it had made seventeen semi-annual reports, each one of which showed that it had sold lands at a price in excess of \$2.50 an acre, and it was a fact perfectly familiar and well known that the company was selling its timber lands not to actual settlers, and in quantities exceeding 160 acres to one purchaser.

With the aspect of the case which we are now considering, the Judge on the final hearing did not deal. He said:

“Of course, there are many other questions which have been discussed and which were discussed at the time of the previous hearing; but those questions are all subsidiary, perhaps, save and except that the railroad company claims that the government is estopped by standing by, knowing that these lands were being sold, and allowing them to be sold in this way, and therefore that the Government ought not to prosecute this proceeding. I have given the gist of the defense pleaded in that

matter. But the Court determined that matter in the hearing upon the demurrer. The question as raised at that time was as to the matter of estoppel, and the Court then determined the legal question. I do not think, so far as I have looked into the testimony, that the issues are changed in the least."

"Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the court that the grant to the railroad company carries upon its face notice of what it is. The grant is not only a grant—it is a law, and the people dealing with the grant must take notice of the terms thereof and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice of what the law required, and it must be considered to hold subordinate to any interest which the Government might acquire in the property by reason of an infraction of the law which would entail a forfeiture of the grant."

In the argument upon the decision of the demurrer to which the learned Judge refers in the citation just quoted, he dealt at considerable length with the claim of waiver and estoppel. But the evidence upon which we now rest, the contemporaneous Governmental and departmental construction of this provision, was not then before the Court, and the question which we are now raising could not then have been disposed of by him, nor, as we have seen, did he consider it after the evidence had been introduced upon the final hearing.

In the opinion upon the demurrer the learned Judge said that there was nothing "stated in the bill from which it can be inferred that the Government assented to them (the sales) in any way, and hence it cannot be considered to have waived the condition." This is quite true. The Court was then dealing with the facts stated in the bill and not with the facts stated in the answer or as proved upon the trial.

The Union Trust Company had a right to rely upon the construction which the railroad company had placed upon this provision, and in which the Government had acquiesced for so long a period. It is no answer, as it seems to us, that the trust company had notice of the terms of the Act. We may assume that it did. It by no means follows, however, that it should have known that the Government would thereafter attempt to place upon the provision a construction which would forfeit the grant upon the sale by the railroad company of any portion of the land to any person other than an actual settler, when such lands were incapable of settlement and cultivation. It had a right to assume that the Government which had for so long a period acquiesced in the sale of such lands, and of lands chiefly valuable for timber, to persons other than actual settlers, and upon terms other than those mentioned in the proviso, would continue to act upon the construction which had been placed upon the Act.

Upon the strength of this construction \$20,000,000 of bonds were issued under the mortgage to the Union Trust Company, which were used to retire the bonds then secured by the two outstanding mortgages upon

the property of the railroad company and in completing the construction of the road; and of these bonds there are now outstanding and unpaid \$17,745,000, almost all, if not all, of which are held in Germany and other countries. The trust company was required to release such bonds from the lien of the mortgage in order to enable the railroad company to make a good title to the purchaser. For every mile of railroad and telegraph constructed from Ashland in 1887, the company undertook to pay \$100,000 in these mortgage bonds (Exhibit No. 10, Stipulation 1697). The distance from Ashland to the southern boundary of California was 24.135 miles. The total of bonds issued for the construction of that part of the road amounted therefore to \$2,413,500. It is in evidence that the cost of construction from Ashland south was very great. The road lay over the Sisyikou mountain range. The railroad had just emerged from the receivership and its past history was one of failure. (Koehler, 1902-1908.)

It is utterly at variance with the dictates of prudence that the bondholders should have advanced these large sums of money if they had believed the proviso capable of the construction for which the Government now contends. It is equally apparent that the bondholders, or their representatives, must have known, and they will be assumed to have known, the previous course of dealing between the railroad company and the government, in respect to the sale of the lands.

- (7) This construction is consistent with the purposes of the grant.

We accept and adopt the language of the Court when it said:

“Interpretation must be had in the light of the conditions prevailing at the time of the enactment, and thus by standing in the place of the legislative body its intendment may be gathered by looking through its vision at the things as they then existed, and the probable exigencies that give rise to the measure.

“In *Platt vs. Union Pacific R. R. Co.*, 99 U. S. 48, 60, construing the Union Pacific Land Grant by Act of 1862, the Court says:

“‘All will concede * * * we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language which it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.’

“As stated by Mr. Justice Jackson in *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S. 486, 502:

“‘Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made, rather than at a later period, when different ideas and theories may prevail.’”

We are to look then at the conditions in Oregon in 1866 and in 1869; at the purposes for which the land grant was made, and at the topography of the lands themselves, to ascertain whether the construction which

the Government and the Court now place upon the proviso is the construction which Congress then intended should be placed upon it.

Oregon had been admitted into the Union in 1859. It was almost an uninhabited wilderness. Little was known of the great stretches of forest lands which covered the mountainsides of the valleys through which this road was to be built. The grant was made "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad." The only lands which had then been opened up or which could be opened up were agricultural in their character. Before the forests could become available for mercantile purposes, population must greatly increase and capital and enterprise must prepare the way for new industries. Then the timber was only an incumbrance upon the soil. The land could be used for agricultural purposes only by burning and extracting the roots of the trees at great expense. After this had been done, much of the soil was incapable of cultivation. If we assume that those Government witnesses are correct who say that on almost every quarter section, after the timber should be cut, there were some acres that could be plowed, is it possible to believe that Congress meant that these timber lands should be held by the railroad company until actual settlers could be found who would go upon a quarter section and clear it for the sake of cultivating the few acres of plow land which might be found after the clearing had been effected? We know

the history of the Government lands which lay alongside the lands granted to the railroad company. We know that whether sold under the Homestead Act or under the Timber and Stone Act, they were not sold except in rare instances to persons who became actual settlers.

Such being the situation, how could this grant be made practically available for the purpose of aiding in the construction of the railroad and telegraph line? Surely, only if the railroad company had the power to sell the land in the mode in which it was alone practical to make sales. This does not render the proviso meaningless; it limits its operation to the lands agricultural in their character, of which there was at the time the grant was made a very large body. And it permits the sale of the lands chiefly valuable for timber or unsusceptible of cultivation in the only manner in which such lands could be sold, and in the manner in which the Government was in the habit of selling similar lands.

Moreover, we cannot but believe that Congress intended that the railroad company should have the power to mortgage the lands as an entirety. The grant was made in the language of the Act of 1866 "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad;" and the Act provides that "the lands herein granted shall be applied to the building of said road within the states respectively wherein they are situated."

It cannot be doubted that the Act of 1866 authorized a mortgage of the property. The Act contemplated the granting of a fee subject to the conditions expressed. There was no restriction upon a mortgage or pledge of the property, and such mortgage or pledge was indispensable for the purposes for which the grant was made. What was true of the grant to the Union Pacific Railroad Company, as stated by Judge Strong, in *Platt vs. Union Pacific Railroad Company*, 99 U. S. 48-60, was equally true of the Oregon Central:

“We are to give such construction to the language, if possible, as will carry out the Congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers—‘for the purpose of aiding in the construction of the railroad and telegraph line,’ and securing Governmental transportation, etc. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that when granted the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective—dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the

face of the prospective value of the lands, if the railroad was built, who would not be willing to buy them when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind indeed, if it did not foresee this and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart."

There is nothing to indicate that Congress intended by the Act of 1869 to take away from the railroad company the right which it had to mortgage the grant as an entirety.

But if we assume that Congress intended the right to mortgage to be subject to the proviso of 1869, and that that proviso should be construed as a condition, we submit that it would be in the highest degree unreasonable to give to the language of the proviso a construction which would practically defeat the power to mortgage, if any other possible construction can be found. But to construe the proviso so as to require the sale of the lands, whether susceptible of cultivation or not, whether so heavily timbered as to be practically unsuitable for cultivation or not—to actual settlers, when we remember that more than 80 per cent of the lands were not available for actual settlement, would be to nullify practically the power to mortgage, and thus practically defeat the very purpose for which the grant was made, nor, as we have shown, is such construction necessary; on the contrary, it is, as we have attempted to show,

unnatural and inconsistent with the topographical features of the grant and the general policy of federal land legislation.

In order to raise moneys for the immediate construction of the road, the bill alleges that approximately \$8,000,000 was procured during the year 1870 by negotiations or pledge or mortgage bonds (Bill, p. 33); and during 1871, \$2,000,000 was thus raised by the West Side Company. With these funds, the work of constructing the lines of railroad was prosecuted. These facts are admitted by the answer of this defendant (p. 1178). Upon the heel of the Act of 1869 the railroad company assumed the right to mortgage the land grant. Since the Act of 1866 declared that "The lands herein granted shall be applied to the building of the said road within the states respectively wherein they are situated," and there was no other mode in which the lands could then be applied to the construction of the road, by necessary implication the power to mortgage the lands in expectancy as they should be earned was granted. The mortgage then made was paid off by the proceeds of subsequent mortgages, and these in turn were paid off by the proceeds of the bonds secured by the mortgage to the Union Trust Company, which, by its terms, provides that if the railroad company contracts to sell any of its lands granted by the United States and covered by the mortgage, at prices assented to by the trust company, then the trust company shall execute releases, but the purchase price is to be received and applied upon the mortgage debt. The Government introduced evidence to the effect that the value of the railroad with

the exception of the land grants, was, on June 1, 1887, about \$50,000 a mile (Koehler, 1904). The mortgage of July 1, 1887, was restricted to a bond issue of \$30,000 per mile, and the bonds were payable in forty years; that is, in 1923. At that time the railroad was in the hands of a receiver and its only record was one of failure (1905). The Southern division from Ashland was not constructed. When that connection was made, the expert called for the Government thought that the value of the road was less. He based his estimate of the value upon the traffic arrangement with the Southern Pacific System. This evidence, together with the admitted fact (Bill of Complaint, p. 49 of Record), that the bonds are guaranteed by the Southern Pacific Railroad Company, is submitted by the Government as leading to the inference that the bondholders will not be prejudiced by a forfeiture of the land grant.

Considerations of this kind would have been pertinent at the time the parties were in treaty respecting the security which should be given for the proposed loan of \$20,000,000. But after the money had been obtained upon a pledge of the land grant as security for the loan, there can be no equitable justification for depriving the lenders of the securities for which they stipulated. A deprivation of that security must, we submit, be justified by the strict terms of a legal right. This defendant, as trustee for the bondholders, in the performance of the duties which it has undertaken, must and does insist upon retaining for their benefit all of the securities for which it stipulated in procuring the loan. It will be time enough for the Government to

present equitable considerations as justifying the forfeiture of the security when the debt shall have been fully paid. In the meantime, courts cannot be oblivious to the fact that railroad properties are becoming yearly more precarious security.

POINT II

THE PROVISIO IN THE ACT OF 1869 AS CONSTRUED BY THE COURT IS VOID, BECAUSE IN RESTRAINT OF ALIENATION.

(1) The Court construed the proviso as a condition subsequent, and held that the title to the granted lands was held on the condition that the lands granted should be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding \$2.50 per acre, and that this condition applied to all the lands included in the grant.

The Court declined to consider the evidence offered for the purpose of showing that the lands were incapable of settlement and cultivation. Its position was that whether the lands were capable of settlement and cultivation or not, the condition required that the railroad company should sell them to actual settlers upon the terms of the proviso. But a condition which requires that lands not capable of actual settlement shall be sold to actual settlers, is impossible of performance and repugnant to the grant.

(2) A condition subsequent which is impossible of performance, or which is repugnant to the grant by

which it is created, or to the estate to which it is annexed, is void, and performance is dispensed with, and the estate vests absolutely.

In considering the effect of impossible conditions Lord Coke classes them under these heads:

Firstly: When they were possible at the time of their creation, but afterward become impossible, either by the act of God or by the act of the party. Secondly: Where they are impossible at the time of their creation. Thirdly: When they are against law. Fourthly: When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. (Coke Litt. 220.)

The rule laid down by Lord Coke as to the second class of impossible conditions, is supported by all the authorities, both ancient and modern.

VI Amer. & Eng. Enc., p. 506.

Elliott on Contracts, Sec. 3876.

Burdis vs. Burdis, 70 Amer. St. R. 825, and note,
p. 830.

Harrison vs. Harrison, 105 Ga. 517.

Bain vs. Parker, 77 Ark. 158.

Stockton vs. Turner, 7 J. J. Marsh, 192.

Case vs. Dwire, 60 Iowa 442.

Jones vs. Fort Huron, etc., Thresher Co., 171
Ill. 502.

Wead vs. Gray, 78 Mo. 59.

Kelley vs. Meins, 135 Mass. 231, 235.

Davis vs. Gray, 16 Wall. 203, 231.

St. L., etc., R. R. Co. vs. Mathers, 71 Ill. 592.

U. S. vs. Arredondo, 31 U. S. 689.

It needs no argument to show that a condition attached to a grant that the lands conveyed shall be sold only to actual settlers is incapable of performance if the land is incapable of actual settlement.

It is equally apparent that a grant upon condition that the land shall be sold to a person or for a purpose to whom or for which it is impossible it shall be sold, amounts to a total restraint of alienation, and is repugnant to the grant. Hence, such a condition is also included in the fourth class of impossible conditions of Lord Coke. A condition in a grant which is in total restraint of alienation, is void.

Potter vs. Couch, 141 U. S. 315.

Schermerhorns vs. Negus, 1 Denio. 448.

Barnard's Lessee vs. Bailey, 2 Har. 56.

McCullough's Heirs vs. Gilmore, 11 Pa. St. 370,
374.

Anderson vs. Cary, 36 Ohio St. 506.

Atwater vs. Atwater, 18 Beav. 330.

Walker vs. Shepard, 210 Ill. 100.

A restraint of alienation, except to a particular person, is bad. Whether a restraint of alienation to a particular class would be such a restraint of alienation as to be void, may depend upon a variety of circumstances (15 Halesbury's Laws of England, Vol. 15, p. 422; Muschamp vs. Bluet, 1607, Bridg. 132; Attwater vs. Attwater, 1853, 18 Beav. 330 Sir. J. Romilly). If a restriction on the price is added, the restraint has been held to be void (Crofts vs. Beamish, 1905, 2 Ir. 349, Ca.)

But the objection here is not merely that the restraint is to the sale to a class, but that sale to the designated class of a large proportion of the land is impossible. Suppose there are 10,000 quarter sections, or even one, which no actual settler will purchase in good faith because the land cannot be cultivated. What is the railroad company to do with this land? According to the construction of the court below, it cannot sell it to anyone. It is, therefore, deprived of the power of alienation. This is a much stronger case than in *re Rosher*, 26 Chancery Division, 801, where a devise was made to a testator's son in fee with a proviso that if the son should desire to sell in the lifetime of the testator's wife, she should have the option to purchase at 3,000 pounds for the whole, and a proportionate price for any part. Three thousand pounds was much less than the value of the estate, and it was held that the proviso resulted in an absolute restraint of alienation, and was therefore void. Similarly a provision that lands shall be sold only to the members of the testator's family, amounts to a restraint of alienation, for suppose no member of the testator's family should be willing to purchase—the owner of the fee could never dispose of the property (*Attwater vs. Attwater*, 18 Beav. 330.)

But if the construction of the proviso for which we contend should be adopted, then, even though it be regarded as a condition, it would attach as such condition only to the grant so far as it applied to lands susceptible of settlement and cultivation. A breach of such a condition would arise only in case of a sale of such lands

in violation of the terms of the proviso, and the forfeiture would apply only to the lands to which the condition attached.

POINT III

THE LAST PROVISIO OF THE ACT OF 1869 WAS NOT INTENDED TO CREATE, AND DID NOT CREATE, A CONDITION SUB- SEQUENT.

The Court below held that the proviso created a condition subsequent, and it adjudged a forfeiture. The reasons given by the learned Judge, who wrote the opinion upon the demurrer for this conclusion, were in substance:

(1st) That the word “provided” is an apt word to create a condition subsequent.

(2nd) If there be any doubt as to the intention, a construction must be adopted favorable to the Government, and that a limitation of the grant by a condition subsequent would be more favorable to the Government than a limitation by a restrictive covenant.

(3rd) That the construction urged by the railroad company that the proviso creates a mere directive, regulative covenant, unenforcible by legal proceedings, in effect nullifies the proviso.

(4th) That the construction of the proviso as constituting a condition subsequent is in harmony with the

policy of the land laws, and the opinions expressed by Congress at or about the time of the enactment of the Act of 1869.

(5th) That this construction finds support in the opinions in *Nichols vs. Southern Oregon Co.*, 135 Fed. 232, and *Warrior River C. & L. Co. vs. Alabama State Land Company*, 154 Ala. 155.

In opposition this defendant replies:

(First) While the word "provided" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the Acts of 1866 and 1869, read together in the light of the surrounding circumstances.

(Second) If there be uncertainty as to the intention, the proviso is to be construed as a restrictive covenant, and not as a condition subsequent, because such an intent is to be gathered from the Act of 1869 in connection with the Act of 1866, read in the light of the surrounding circumstances.

(Third) That a construction of the proviso as a condition subsequent is not more favorable to the Government than a construction that it creates a restrictive covenant; but if it were, there is no rule of construction which, under the circumstances of this case, requires the Court so to construe the proviso.

(Fourth) The proviso construed as a restrictive covenant is enforceable, and such a construction is in harmony with the public land policy of the United States, and with the objects and spirit of the Act of 1866.

(Fifth) That *Nichols vs. Southern Oregon Co.*, supra, and *Warrior River C. & L. Co. vs. Alabama State Land Co.*, supra, referred to, decided nothing respecting the questions involved in this case, and shed no light upon it.

- (1) While the word "proviso" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the language of the Acts of 1866 and 1869 read together in the light of all the circumstances properly to be taken into consideration.

In support of our contention we cite the following authorities:

- Green County vs. Quinlan*, 211 U. S. 594.
Clapp vs. Wilder, 176 Mass. 332.
Post vs. Weil, 115 N. Y. 361.
Stanley vs. Colt, 6 Wall. 119.
Parker vs. Nightingale, 6 Allen 341.
Georgia B'k'g Co. vs. Smith, 128 U. S. 181.
Halley vs. Kafitz, 148 Cal. 393 (R. N. S. 741, *Note*).
Sohier vs. Trinity Church, 109 Mass. 1.
MacKenzie vs. The Trustees of Presbytery of J. C., 67 N. J. Eq. 652, R. N. S. 227.
Scoville vs. McMahon, 62 Conn. 378.
Avery vs. N. Y. C. R. R. Co., 106 N. Y. 142.
Ball vs. Millikin, 31 R. I. 36-41.
Druecker vs. McLaughlin, 225 Ill. 367.
Elliott on Contracts, Sections 1528-1529.

Green County vs. Quinlan, 211 U. S. 594, was an action to recover upon certain bonds issued by the defendant county. Among other things the defense set up was that the bonds were issued in payment of a subscription to the stock of the Cumberland & Ohio Railroad Company upon two *conditions*, namely: that the railroad could be constructed in a designated manner, and that the county first should be exonerated from a prior subscription to the bonds of another railroad company. As to the latter of these conditions, it was held that the condition had been performed and was not available as a defense. As to the former condition, the Court, speaking through Mr. Justice Moody, said:

“It is not conclusive that the obligation thus imposed upon the railroad company is *called a condition*. It frequently has been the case that the word ‘condition’ has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing, courts do not confine their attention to single words, phrases or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of the interpretation often makes it manifest, that that which is called a condition, is really but a covenant or agreement to be performed independently of the counter-obligation with which it is associated. When such an intent is discovered, the courts have no diffi-

culty in giving it effect, *though the result be to disregard the technical meaning of the word 'condition.'*” (Citing many cases). (Italics ours.)

The same idea is tersely expressed in *Morse vs. Hayden* (81 Me. 230), where it is said “conditions have no idiom.”

The same rule of construction is stated at greater length by Morton, J., in *Clapp vs. Wilder*, 176 Mass. 322, thus:

“There never has been any hard and fast rule that words, express and apt, to create a condition at common law in a deed should always be so construed. From the time of Lord Coke, if not before, such words have received a different construction when required in order to *promote the obvious intent and purpose of the parties*. Co. Lit. 203a. Lord Cromwell’s case, 2 Co. 70. Shep. Touch 122. 1 Bl. Com. (Bk. 2, Sharswood’s ed.), 151 N. 1.

“The converse has been equally true. Words not apt to create a condition in deed at common law have been construed as creating one when such appeared to be the intention of the parties and the language admitted of such a construction. Shep. Touch. 123.

“Neither does the law look with especial favor upon estate on condition. ‘Conditions subsequent,’ it is said by Chancellor Kent, ‘are not favored in law.’ 4 Kent Com. 129. They are strictly construed against parties seeking to enforce them, and equity affords relief in various cases from forfeiture

for a breach of them. *Bradstreet v. Clark*, 21 Pick. 389. *Merrifield vs. Cobleigh*, 4 Cush. 178. *Lilley vs. Fifty Associates*, 101 Mass. 432. *Lundin vs. Schoeffel*, 167 Mass. 465, 470, and cases cited.

“These doctrines have been long and well settled, and they have led this court and other courts frequently to construe so-called conditions, not according to the strict meaning of the words used, but in such a manner as to carry out the intentions of the parties as manifested by a *fair interpretation of the language, when viewed in the light of the attendant circumstances*. If it appeared that the parties intended to create an estate upon condition effect has been given to the intention. If it appeared that some other right or obligation was intended to be created, the language has been construed accordingly. The matter has been regarded as one of *substance*, rather than of form, and the cardinal rule of construction has been not to ascertain the *effect* in regard to *estates* upon condition, but to ascertain and enforce the *intention of the parties* so far as it could be done consistently with established rules. *In numerous cases, for one reason or another, words apt to create a condition at common law in a deed, have been interpreted as meaning something else—limitations, covenants, restrictions, easements, servitudes, and trusts—because it was thought that such a construction would best conform to and carry out the intention of the parties*. *Parker vs. Nightingale*, 6 Allen 341. *Chapin vs. Harris*, 8 Allen 594. *Schier vs. Trinity Church*,

109 Mass. 119. Jeffries vs. Jeffries, 117 Mass. 184. Episcopal City Mission vs. Appleton, 117 Mass. 326. Skinner vs. Shepard, 130 Mass. 180. Ayling vs. Kramer, 133 Mass. 12. Hopkins vs. Smith, 162 Mass. 444. Cassidy vs. Mason, 171 Mass. 507. Avery vs. New York Central & Hudson River Railroad Co., 106 N. Y. 142. Post vs. Weil, 115 N. Y. 361. Clark vs. Martin, 49 Penn. St. 289. Watrous vs. Allen, 57 Mich. 362. Lake Erie & Western Railroad vs. Priest, 131 Ind. 413. Wier vs. Simmons, 55 Wis. 637. Fuller vs. Arms, 45 Vt. 400. Mills vs. Davison, 9 Dick. 659. Neely vs. Hoskins, 84 Maine 386.

“The decisions in which this has been done have not been confined to any particular class of cases, such as, for instance, building schemes and plans of general improvement, but the rule has been applied in other cases, and has been recognized in cases where it was not applied. It is an application to conditions in deeds, of the rule adopted in regard to other written instruments, namely: to so construe them as best to promote the obvious intent and purpose of the *parties*. Merrifield vs. Cobbleigh, 4 Cush. 178. It is the same principle which has led to the construction of a deed intended to take effect *in futuro*, as a covenant to stand seized (Trafton vs. Hawes, 102 Mass. 533, 541), and is, I think, a sound and sensible rule, and one calculated to do justice between parties.” (Italics ours.)

In *MacKenzie vs. Trustees of Presbytery of J. C.*, 67 N. J. Eq. 652, Judge Green said:

“Words seemingly appropriate to a condition only, may introduce a covenant, a condition or a declaration of trust, and the whole of the clause submitted to investigation must, in form and scope, be considered in order to determine within which class it should fall.”

“Provided, always,” which Blackstone, in his *Commentaries*, Book 2, 299, mentions as typical words of condition, may either alone or with other words be found in introducing reciprocal covenants in agreements (quoting illustrations). The words employed by the draughtsman of the deeds of conveyance under examination are ‘on condition,’ ‘on further condition,’ and although these also are words appropriate to conditions in deeds (*Litt. Ten.*, Sec. 238), there are not wanting in our own reports illustrations of a wider use.” (Citing cases.)

The Court then proceeds:

“All of the words used in the clause in question being considered and the absence of words of determination or reverter being noted, the intent of the parties to be exercised as permitted by the principles of law will be best subserved by holding the clause to be a declaration of trust.”

Of course the absence of words of “determination or reverter” are not necessary where the situation of the parties and the object to be accomplished, make their intention clear.

So in *Post vs. Weil*, 115 N. Y. 367, 374, where the words of the deed were "upon especial condition that no part of the land or buildings thereon shall ever be used or occupied as a tavern," it was held that this was a restrictive covenant. The Court, speaking through Gray, J., said:

"The words 'provided always and these presents are upon this express condition,' seem to me to serve the purpose of restricting that use of the premises which was, of course, general and unrestricted under the grant. They do not import any new and separate idea, and I think the rule is a safe one that words alone should not be deemed to create a condition subsequent and to be capable of importing possibly future forfeiture of estate, except where they do introduce some new clause, the sense of which is not referable to and in qualification of some preceding clause and evidences some part of the consideration for the grant of the property by the imposition of an obligation upon the grantee.

"Looking at these words may we say as they stand in the deed, that they are conditional in sense, when they in reality serve to qualify the generality of the grant in the language which precedes them? I think we cannot in reason."

In *Schovill vs. McMahon*, 62 Conn. 378, the Court said:

"The law is well established that such conditions are not favored and are created only by express

terms or by clear implication; the courts will always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so; that if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted; and though apt words for the creation of a condition are employed, yet, in the absence of all express provision for re-entry or forfeiture, the Court from the nature of the acts to be performed or prohibited by the language of the deed, from the relation or situation of the parties, and from the entire instrument will determine the real intention of the parties."

So in *Ball vs. Millikin*, 31 R. I., 36-41, it was held:

"Conditions are not favored in law as they tend to destroy estates, but conditions may be created if such an intention appears from an examination of the whole deed. There are certain words which are considered appropriate to create a condition, but when these apt words are used, the provision is not always construed as a condition, and without these words conditions have been found to exist when such appears to have been the intention of the parties." *Clapp vs. Wilder*, 176 Mass. 332. Whether words amount to a condition or a limitation or a covenant, may be a matter of construction, depending on the contract. *Kent's Com.*, Vol. 4, 132.

The rule is well stated in *Halsbury's Laws of England*, at Vol. 10, p. 478:

“A grant or a covenant may be followed by words contemplating that one of the parties is to do or abstain from doing some act. Such words are commonly introduced by ‘provided that’ or ‘to be’ or they are contained in a participial clause, and they may operate as a condition or qualification of the preceding covenant, or as a separate covenant. For them to operate as a covenant, it must appear that the act or abstention is intended to be obligatory.”

In the following Massachusetts cases, although the word “condition” was used, the Court held that the words were not intended by the parties to be a technical condition, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land and are to be construed as restrictions.

Ayling vs. Kramer, 133 Mass. 12.

Cassidy vs. Mason, 171 Mass. 507.

Episcopal City Mission vs. Abbotton, 117 Mass. 336.

Whether particular words are to be construed as a condition or as a covenant, depends upon whether the intent to be gathered from the instrument is that the parties sought to provide for a forfeiture or merely for an enforceable obligation.

Where the purpose of the grant is in its nature general and public and not primarily for the benefit of the grantor, the courts lean strongly to a construction

of a restriction which will support the grant rather than defeat it.

Green vs. O'Connor, 18 R. I. 56.

Neely vs. Hoskins, 64 Me. 386.

Episcopal City Mission vs. Appleton, 117 Mass. 326.

Post vs. Weil, 115 N. Y. 361.

Avery vs. Railroad Co., 106 N. Y. 142.

Carroll County Academy vs. Gallatin Academy Co., 104 Ky. 621.

- (2) The proviso is to be construed as a restrictive covenant and not as a condition subsequent, because such an intent is to be gathered from the Act of 1869 read in connection with the Act of 1866, in the light of all the circumstances properly to be considered.

(A) In applying the rule of construction derived from the foregoing authorities, it is important at the outset to consider the relation of the parties and the relation of the Act of 1869 to the Act of 1866, together with the language and purpose of that Act. The West Side Company had filed its assent within the time fixed by the Act of Congress. Meanwhile, the legislative assembly of Oregon had repudiated by joint resolution the legality of its prior designation of the West Side Company, declaring that there was no such company in existence, and that the prior resolution of the legislative assembly had been passed under a misapprehension of the facts.

It is not in our view material to the question to discuss or ascertain when the East Side Company became vested with the title to the grant. It is beyond dispute so far as this case is concerned, that when the East Side Company filed its assent under the Act of April 10, 1869, in the Department of the Interior, the legal title to the grant, subject to the condition subsequent that the road be constructed, vested in that company, and by conveyance authorized by the Act of July 25, 1866, subsequently passed to the Oregon and California Railroad Company, which also filed its assent. The West Side Company had filed an assent, but it had permitted a breach of the condition subsequent in respect of the completion of twenty consecutive miles of road. The East Side Company, which had been designated by the legislature, was in default in respect of filing its assent, but we make no point in this brief that it was not competent for the Congress, in extending the time for the filing of assent, to annex to it the provisos contained in the Act of April 10, 1869. The East Side Company was recognized by the Government. The road was built and the lands conveyed.

It is important to bear in mind that these grants were *not voluntary conveyances*. On the contrary, the grantee was expected to and did furnish abundant consideration. Not only was the railroad to be constructed and equipped, which was the purpose and controlling consideration exacted by the Government, but the Act of 1866 expressly provided that the grants were made "upon the condition that the said companies *shall keep said railroad and telegraph in repair and use, and shall*

at all times transport the mails upon said railroad and transmit dispatches by said telegraph line for the Government of the United States when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge and expense of the corporations or companies owning or operating the same when so required by the Government of the United States." Under such circumstances the railroad company occupies the position of a purchaser for a full and valuable consideration.

"Where a grant is made by the state in aid of the construction of some work of a public or quasi public character, the construction of the work is the consideration of the grant, and when that is accomplished the consideration is received and retained by the Government."

Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 135 U. S. 333.

In this case not only has the railroad company constructed and equipped its road in payment for the grant, but it has expended its money and performed valuable services for the Government extending through

a period beginning with the completion of the road to the present time, and is under a perpetual requirement either by way of condition or covenant to make similar expenditures and to render similar services for the Government upon its demand for all time to come. This is the price which it was to pay, has paid, and is to pay for the grant of July 25, 1866. It may fairly be assumed that what it has paid and must pay will constitute a sum largely in excess of any amount which the Government could have realized by any other disposition of the property, to say nothing of the incidental benefits derived by the country from connecting Oregon by rail with the rest of the United States and facilitating its settlement and upbuilding.

(B) As further bearing upon the construction of the words in question, great significance is to be attached to the phraseology of the Act of 1866, of which the Act of 1869 was an amendment, and the Act approved May 4, 1870, of which the Oregon Central Railroad Company of Portland was the grantee, to "Aid in the construction of a railroad from Portland by way of Forest Grove to Astoria and McMinnville."

The Act of 1866 expressly provided, with regard to the filing of the assent required by Section 6 and the completion of the railroad within the time named, that:

"In case the said companies shall fail to comply with the terms and conditions required, namely: by not filing their assent thereto as provided in Section 6 of this Act, or by not completing the same as provided in said Section, this Act shall be *null*

and void and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, *shall revert* to the United States."

But as we have already stated, Section 5, which required that the railroad company should keep its railroad and telegraph in repair and render the services heretofore set forth, is also stated to be upon "*condition*," but there are no words of reverter or defeasance in the Act respecting or referring to the non-performance of any of the acts required by Section 5, and it is perfectly manifest that the use of the word "*condition*" in Section 5 does not import a condition subsequent, but a covenant.

In this view, when, by the Act of 1869, an amendment was made to the Act of 1866 and the last proviso being introduced with the words "provided further" without words of reverter or defeasance attached thereto, the conclusion that Congress intended thereby to create a covenant and not a condition is almost irresistible.

Equally important and persuasive as bearing upon the construction of the words in question is the language of the Act of 1870. By that Act a grant was made "for purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove, to the Yamhill River, near McMinnville, in the State of Oregon," to the Oregon Central Railroad Company. It was provided that the lands so granted "excepting only

such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground and other needful uses in operating the road, *shall be sold by the company only to actual settlers* in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre," and it was provided that the company should, by mortgage or deed of trust, *set apart the net proceeds* of the lands granted as a sinking fund for the purchase and redemption of the bonds of the company, issued for the purpose of constructing the road, and it was further enacted, "That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph lines within two years and the entire railroad and telegraph within six years from the same date." The fact that no words of condition, reverter, or defeasance, were connected with the provision for the sale of the lands to actual settlers, whereas it was expressly provided that the grant was made upon condition that the company should complete the road within the time named, indicates in the strongest possible manner, that with regard to the West Side Grant, Congress had no intention that a failure to sell the lands to actual settlers should be attended with a forfeiture of the grant, and no reason can be suggested why it was intended that a different rule should be applied to the East Side Grant. But a still stronger and even more persuasive illustration is perceived when one remembers

the fact that the grant of 1866 was in aid of one railway, *part of it* in California and the other *part of it* in Oregon. The Court will observe that the evidence of this is found first in the title "An Act granting lands to aid in the consruction of *a railroad and* telegraph line from the Central Pacific Railroad in California to Portland, in Oregon." The pertinent language of the first section is as follows:

"That the California and Oregon Railroad Company 'organized under an Act of the State of California to protect certain parties in and to a railroad survey' to connect Portland, in Oregon, with Marysville, in California, approved April 6, 1863, and such company organized under the laws of Oregon as the Legislature of said State shall hereafter designate, be and they are hereby authorized and empowered to lay out, locate, construct, finish and maintain a *railroad* and telegraph line between the City of Portland, in Oregon, and the Central Pacific Railroad in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that *part of said railroad* within the State of California beginning at some point to be selected by said company on the Central Pacific Railroad in the Sacramento Valley in the State of California, and running thence northerly through the Sacramento and Shasta Valley to the northern boundary of the State of California; and the said Oregon company to *construct that part of the said railroad*, etc., within the State of Oregon beginning at the City of Portland, in

Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River *Valleys* to the southern boundary of Oregon, where the same shall connect with the part aforesaid, to be made by the first-named company. Provided, that the company completing its *respective part of said railroad* and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right and the said company is hereby authorized to continue in constructing the same beyond the line aforesaid with the consent of the state in which the unfinished part may lie *upon terms mentioned in this act*, until the *said parts* shall meet and connect and the *whole line of said railroad* and telegraph shall be completed."

Thus it is apparent that so far as the record shows the California and Oregon Railroad Company was never in default in respect of filing its assent to the terms of the Act of July 25, 1866, and acquired not only the right to build a railroad and telegraph line from the Central Pacific to the southwestern boundary of Oregon, but it acquired also the right, if, when it reached the Oregon boundary, the part of the road which was to be constructed in Oregon by the Oregon company had not been constructed to the boundary line, to proceed, with the consent of the State of Oregon, in constructing the road and telegraph line until it met and connected with so much of the road as had been constructed by the Oregon company. It seems clear from

the Act, keeping in mind the national purpose of the grant, which is clearly expressed in the second section, that if the Oregon company had constructed no part of the road, the California company could have proceeded with the construction, Oregon consenting, of the road through to Portland, and would thereby have earned the grant both in California and Oregon appurtenant under the Act of 1866 to the construction of the entire road. A reciprocal right was given to the Oregon company by which, if, when its constructed road reached the southern boundary of Oregon, there to connect with the California part of the road, the California company had not constructed its part of the road to the boundary line, either in whole or in part, to proceed with the construction to a meeting point or, if there were no meeting point, to the Central Pacific, earning thereby the entire grant. If the California company, therefore, in the exercise of this right, had built, with the consent of Oregon, through to Portland, it would have earned the entire grant without any restriction upon its power of alienation, while, if the California company defaulted in performing the subsequent condition of constructing the railroad and the Oregon company had performed and had built through to a connection with the Central Pacific, it would have earned the entire grant appurtenant to the road built in Oregon and also that appurtenant to the road built in California, but it would have held the entire grant subject to the restriction now contended for by the Government. Can the intent possibly be imputed to the Congress that if the Oregon company had built its road, after assenting to the Act of

1869, to the southern boundary of Oregon and had there connected with the California part of the road, having thereby acquired by the construction of the road the appurtenant grant in each state, that by the Act of April 10, 1869, the California company was to be perfectly free of restriction in the sale of its lands, while the Oregon company, after constructing a part of the same road and earning a part of the same grant should be prohibited from selling any of its lands except to actual settlers in tracts of not more than 160 acres to one person and at a price not exceeding \$2.50 an acre? Upon what theory of public policy or fair dealing can an intention to so discriminate in favor of the one and against the other be imputed to the Congress in an attempt to secure a permanent work of great national importance, the early construction of which it was eager to bring about? Such an intent is not to be imputed, unless the language employed by Congress leaves no other alternative. The policy of the government in respect of the construction of the Union and Central Pacific Railroads, so that the Atlantic and the Pacific might be connected by rail, was set forth in a delineating and undoubtedly accurate way by Mr. Justice Davis in delivering the opinion in the *United States vs. Union Pacific R. R. Co.*, 91 U. S., 79, as follows:

“Many of the provisions in the original Act of 1862 are outside of the usual course of Legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed.

The War of the Rebellion was in progress and owing to complications with England the country became alarmed for the safety of her Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the Continent. Such a road would bind together the widely separated parts of our common country and furnish a cheap and expeditious mode of transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government in the performance of an imperative duty could not justly withhold the aid necessary to build it, and so strongly pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement and charged the Government itself with the direct execution of the enterprise. *This enterprise was viewed as a national undertaking for national purposes* and the public mind was directed to the end in view rather than to the particular means of securing it. Although this

road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast, unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, *settlements made where settlements were possible*, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * It is true, the scheme contemplated profit for individuals; for without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated the company to advance private interests and agreed to aid it on account of the supposed incidental advantages that the public would derive from the completion of the projected railway. But the primary object of the Government was to advance

its own interests and it endeavored to engage individual co-operation as a means to an end—the securing of a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself viewed in the light of contemporaneous history * * *. That there should, however, be no doubt of the national character of the contemplated work, the body of the Act contains these significant words: ‘And the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time having due regard for the rights of said companies named therein, add to, alter, amend or repeal this Act.’ ”

The first Union Pacific Act was in 1862, four years before the grant of July 25, 1866. Neither the Union Pacific nor Central Pacific Railroads had been constructed to Ogden, when the Act of July 25, 1866, was passed. Indeed, they were not finished to a point of connection until 1869.

It is perfectly obvious that the policy which led the Congress to aid with land and with money and with subsidy bonds the construction of the Union and Central Pacific would be quite incomplete unless a branch road

(it was many times so referred to in Congress) was constructed from some point on the Central Pacific to Portland.

The Congress cannot be held to have intended by the last proviso in the Act of April 10, 1869, to fasten upon the grant made by the Act of 1866 a condition as the price for one year extension of time to the company to file assent that the lands when acquired should never be sold by the company except to actual settlers, in tracts not exceeding 160 acres to one settler and at a price not exceeding \$2.50 an acre for several reasons: (a) It would have inevitably destroyed the value of the grant as a basis of raising money by way of mortgages thereon with which to construct the road and otherwise to perform the condition which by an acceptance the railway company would have agreed to do; (b) As accurately stated by this Court in the opinion overruling the demurrer to the bill, the holders of bonds secured by mortgage on the road and land grant would be chargeable with notice of whatever restrictions the law imposed upon the power of sale of the lands when earned; (c) It must be remembered, too, that the Oregon of that day was not the Oregon of this day; it was remote and inaccessible. It goes without saying that in that day the mortgage of lands not yet earned to raise money for the construction of a road not yet built, in that region as it then was, would not be peculiarly attractive to investors, who would be obliged to take the chances of misapplication of the proceeds of the bonds as well as other unattractive chances, and certainly if the world had been notified that annexed to the land grant was a

condition that when earned none of the lands ever could be sold by the company except to actual settlers, in tracts not exceeding 160 acres to any one settler, and at prices not exceeding \$2.50 an acre, under penalty of forfeiture of the entire grant, it would have destroyed the land grant as a basis of credit, and especially as a large part of the land, as could be ascertained from the map, must necessarily lie in a mountainous region. The timber with which it was covered, if known to investors in this country and abroad, would not have added much, if anything, to its value as a basis of credit in any event, and little, if any indeed, if it had been generally known that the power of the company to sell the grant when earned was burdened by such a restriction, for states far east of the Rocky Mountains contained what was then supposed to be an inexhaustible supply of timber, vastly nearer a market for lumber, and the Congress must be presumed to have known that the proviso construed as a condition subsequent would be impractical of execution and fatal to the utilization of the grant as a basis of credit.

A bare statement of this obvious fact would seem to be sufficient. Such a restriction upon the Oregon grant alone would tend to defeat the construction of the road in Oregon by an Oregon company and to force its construction from the Central Pacific to Portland by the California company, which would take it, with the consent of Oregon, free from any such restriction, securing bonds which would be marketable. It is inconceivable that the Congress in 1869 ever intended to so discriminate in favor of California and against Oregon.

Undoubtedly by the general laws of Oregon under which the Oregon companies were organized power was conferred to borrow money and to secure the same by way of mortgage upon its property in possession and in expectancy. As between the corporation and the United States the right to mortgage the grant in expectancy would seem to be necessarily implied from the language of the granting Act. At the time the grant was made no railroad had been constructed between Portland and the point of connection with the Central Pacific. The Act of Congress limited the time within which the road should be completed. Oregon had designated, in compliance with the Act of Congress, twice the grantee, which evidenced her assent to the terms of the Act of Congress of July 25, 1866. That Act provided that,

“All lands herein granted shall be applied to the building of said road within the States respectively wherein they are situated.”

There were but two ways in which the lands, none of which had been earned by the construction of the road, could be applied to the construction thereof: One was by raising the money to build twenty consecutive miles of road, thereby earning the lands coterminus and appurtenant to the road thus constructed; it could then mortgage the lands in expectancy and the piece of road, or it could otherwise dispose of the lands for the purpose of raising the money to build the next section of twenty miles and to repay those who had furnished the money for the construction of the first section of twenty consecutive miles. That would be an impossible course and

one not known to the writer hereof to have ever been pursued. If the company had been obliged to proceed in this way there was every probability that it could not have built the road by 1880, it lying in a mountainous country requiring much expensive tunnelling. Practically the lands could not be pledged except by way of mortgage in expectancy upon a road not yet built but expected to be built, largely through the credit afforded by the land grant to be earned by its construction. The lien would attach as rapidly as the road was built, and upon the lands as rapidly as they were earned, and it was on the faith of the grant and the building of the road, that money could be raised and was raised to secure the construction of the road. It requires no argument to show that if it had been understood by the bondholders who purchased the bonds upon the faith in part of the land grant, that it was a part and one of the conditions of the grant a violation of which would subject it to entire forfeiture, that no land should be sold except in tracts of not exceeding 160 acres to an actual settler at two dollars and a half an acre, and that if the railroad companies sold two hundred and sixty acres to any one person at three dollars an acre the whole grant would be forfeitable, the value of the grant as a basis of credit would have immediately vanished.

(C) On the construction that the last proviso of the Act of April 10, 1869, is a condition subsequent, any breach of which would forfeit the grant, it is not only legitimate but important to consider the difference between the grant of May 4, 1870, to the Oregon Central

Railroad Company, of Salem, and the Act of April 10, 1869. The bill embraced the grant of lands earned and patented for the construction of the road under the Act of May 4, 1870, to the Oregon Central Railroad Company of Portland, which was designated by the Legislature of Oregon as the grantee under the Act of July 25, 1866, and a part of the road provided for by the Act of 1870 had been granted by it as such grantee under the Act of 1866. The road from the Central Pacific to Portland was intended to give Portland a connection with San Francisco and with the East. The road in 1869 was uncompleted. It was important to Oregon and important to the Government that it should be completed. What possible motive could lead the Congress on April 10, 1869, to fasten upon the grant of July 25, 1866, this legislative mortmain while, within twelve months and twenty-six days, it conferred a grant upon the Oregon Central Railroad Company of Portland, in aid of the construction of the railroad from Portland, by way of Forest Grove to Astoria and McMinnville, with a section requiring it to sell the lands earned by it only to actual settlers in quantities not exceeding 160 acres to one settler and at a price not exceeding two dollars and a half an acre, with no phase of proviso or condition whatever?

(D) It is important to note, comparing it with the Act of April 10, 1869, that the Act of May 4, 1870, making a grant of lands to the Oregon Centrail Railroad Company of Portland to aid in the construction of a railroad and telegraph lines from Portland to As-

toria and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, the said Company then being engaged in constructing the road. contains this section (Sec. 4) :

“That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, stations, side-tracks, wood-yards, standing ground and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.”

Section 5, in order to secure the enforcement of this covenant or this promissory obligation which an acceptance of the grant created on the part of the company, provided:

“That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, etc., not exceeding thirty thousand dollars per mile of road * * * and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been

purchased or redeemed and cancelled * * * And the District Court of the United States, concurrently with the State Courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section."

This can be regarded in no other wise than a covenant restrictive or personal. There is not the semblance of condition subsequent about it. The only section in the Act in which words apt to create a condition are used is the last section, which makes it a "*condition*" of the grant *that the road shall be constructed within the time limited*.

This land now belongs to the Oregon and California Railroad Company and the Bill herein asks the Court to decree a forfeiture of it for breach of *condition subsequent*, treating Section 4 precisely as the Court is asked to treat the proviso to the Act of April 10, 1869, as a condition subsequent for breach of which the grant is subject to forfeiture. How this can be done, in view of the legislation of Congress, it is difficult to understand. Eight of the authorities cited by counsel for defense referred to by Counsel for the Government in their brief on demurrer upon the subject of condition subsequent, are cases of the character just described where the grant contained the provision designating the purpose for which the land grant should be used, but there was nothing in the grant showing an *intention* of creating a condition and the court refused to *imply* one. This is, so far as the words quoted are italicized, strictly correct. It is rather difficult, however, to square

the proposition of the learned counsel, sustained as it is by the authorities which he cites, including the case of *Wright vs. Morgan*, 191 U. S. 55, with the proposition which he is urging here, that the grant of 1870 is a *grant upon condition subsequent subject to forfeiture* which his Bill prays this Court to adjudge. The method which the Congress saw fit to adopt to secure the performance of Section 4 of the Act of May 4, 1870, is utterly inconsistent with the notion that there is any condition subsequent in that section, and comports simply with the proposition, that it was a promissory obligation or restrictive covenant to be enforced in the manner pointed out by the Act of Congress. In other words, Congress instead of inserting a condition providing a remedy by forfeiture, adopted a method of its own which was embodied in the Act to secure an observance of the requirements of the provisions. No legislation of Congress, so far as we are aware, has changed that Act or added to that remedy. Indeed, the obligation imposed by Section 4 of the Act of 1870 is an enforceable one in equity and that is the remedy, rather than by forfeiture. It is a part of the grant and a part of the contract inserted by the Congress and accepted by the company, and the remedy provided is exclusive. We are unable to see any warrant by which the Government seeks to forfeit the West Side grant for breach of condition subsequent, and this leads us to inquire also why should an intent be imputed to Congress by the Act of April 10, 1869, to annex a condition subsequent to the lands granted by Congress in Oregon to secure the construction of the Oregon part of the road provided for by the Act of

1866, which would give Portland and the intervening region, by way of the Central and Union Pacific Railroads, when constructed, connections westward and eastward, and to have made no such condition in the Act of May 4, 1870, which was designed to connect Portland with the ocean at Astoria.

- (3) A construction of the proviso as a condition subsequent would not be more favorable to the Government than a construction that it creates a restrictive covenant, but if it would, there is no rule of construction which, under the circumstances of this case, requires the Court so to construe the proviso.

We are constantly to bear in mind that we are seeking to ascertain the intention of Congress in 1869 when it passed this Act, nor should we be forgetful of the admonition of Mr. Justice Strong in *Platt vs. The Union Pacific Railroad Company*, 99 U. S. at pages 48-60, where he says:

“There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we have seen the results of experiment. * * * The unforeseen success of the enterprise and the unprecedented rush of immigration along the line of the railroad, have shed some light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1860 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things

as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.”

(1) The Court below attached great importance to the rule that in construing public grants in doubtful cases the construction should be adopted which is most favorable to the Government, and it assumed that a construction which would work a forfeiture would be more favorable to the Government than that which would create merely a restrictive covenant. We challenge the correctness of this assumption. All the parties, as well as the Court below, are agreed that the purpose of the Act was, primarily, to aid in the construction of the proposed railroad and thus to secure the direct and incidental benefits of rapid inter-communication, for governmental as well as commercial uses. It may be conceded also that by the Act of 1869 Congress expressed the intent that lands available for purposes of settlement and cultivation should be sold only upon the terms of the proviso. In 1869 Congress looked to the completion of the road by the 1st day of July, 1875. By the Act of 1868 the time was extended to July 1st, 1880. No one can doubt, we think, that during the time the road was in process of construction—from 1869 to 1887, a period of eighteen years—it would have been more favorable to the Government to have the power to compel the performance of the covenant respecting the sale and disposition of the land, than to have the power to forfeit the grant.

Suppose that any time before the completion of the road Congress had had the power to forfeit the grant and had exercised that power. What would have been the inevitable result? The railroad company had been unable to complete and maintain the road previous to 1887. It was then a bankrupt. Its rehabilitation without the land grant would have been impossible. No other railroad company could have taken up the task of completing the road with a grant containing such a condition, which is perfectly apparent to any one familiar with the character of the land. A failure of the entire enterprise would have been inevitable. But if the proviso be regarded as a covenant applicable only to agricultural land, it would not have prejudiced the building of the road and could have been enforced if the company had shown, as it had not, any disposition not to conform to it.

Since it was in the interest of the Government that the road should be built and operated, this being the primary purpose of the grant, a construction which would subserve that purpose was the one most favorable to the Government.

It is true that after the road was completed it became more profitable for the Government to retake the land which had then acquired a great value, and still to hold the railroad to its obligation to carry freight for the Government free of charge. But no one can seriously contend that the provisions of a statute or of a contract are to be construed according to the shifting exigencies which may arise and vary with the varying profits or losses which the Government might de-

rive from the construction which from time to time it might insist was most favorable to it.

In the next place it is to be observed that the words we are considering are introduced as a proviso, while in every instance in the Act of 1866, in which a forfeiture of the grant was contemplated, the word "condition" is employed, and there is attached an express direction of reverter. There is, therefore, significance in the change from the word "condition" to the word "provided"; for, while the word "provided," as we have seen, may indicate a condition, it does not uniformly do so; and when the Legislature in the Act of 1869 made use of the word "provided" as distinguished from the instances in which a forfeiture was contemplated under the Act of 1866, we must assume that there was a change of intention.

The word "provided" may, indeed, be used in a statute merely for the purpose of noting an exception to the generality of former provisions; and in such instances the rules of construction require that the matter embraced in the proviso should be strictly construed.

In *United States v. Dixon*, 15 Peters 165, Justice Story says:

'The general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes that where the enacting clause is general in its language and objects, and a proviso is afterward introduced, that proviso is strictly construed and takes no case out of the enacting clause which does not fall fairly

within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

So in *White v. United States*, 191 U. S. 545, it is said:

"If possible, the act is to be given such construction as to permit both the enacting clause and the proviso to stand and be construed together with a view to carrying into effect the whole purpose of the law. (*Kents Com.* 463). The purview of the act and the words of the proviso must be reconciled, if may be, and the operation of the proviso may be limited by the scope of the enacting clause."

(3) But this grant is taken out of the operation of the rule that public grants, in case of doubt, are to be construed most favorably to the Government, by the fact that the Government received and is to receive a full and adequate consideration for the lands granted. In *A. & E. Enc.* Vol. 17, p. 14, after referring to the rule that language will be construed most strongly against the person using it, it is said:

"In case of public grants, however, the contrary rule prevails, and the construction is in favor of the state unless the grant is based on a consideration moving from the grantee, in which case the grant is, it appears, construed as is a private grant—in favor of the grantee."

In *United States v. Denver & R. G. Ry. Co.*, 150 U. S. 1, 14, it is said:

“When an act operating as a general law and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense undeveloped public domain, such legislation stands upon a somewhat different footing from merely a *private* grant and should receive at the hands of the Court a more liberal construction in favor of the purposes for which it was enacted.”

This subject is treated at length by Mr. Justice Earle in *Langdon v. Mayor, etc.*, 93 N. Y. 129-145 where, speaking of the rule of construction of public grants most favorable to the Government, he says:

“But so far as I have discovered, this rule has never been applied—certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted. In 2 Blackstone’s Com. 347, it is said, ‘A grant made by the King at a *suit of the grantee*, shall be taken most beneficially for the King as *against* the party; whereas the grant of a subject is construed most strongly *against the grantor*. Wherefore it is usual to insert in the King’s grants that they are made not at the

suit of the grantee but *ex speciali gratia certi scientia et merio motu regis*: and then they have a more liberal construction.' The reason generally given for the rule is that in a grant proceeding from the application of the subject, the grantee ought to know what he asks, and if that does not appear, nothing shall pass from the King by reason of the uncertainty."

The learned Judge then quotes from the opinion in *Charles River Bridge v. Warren Bridge*, 7 Pick. 344-469, among other things, as follows:

"There are some legislative grants, no doubt, that may admit a different rule of construction, such as grants of lands on valuable consideration and the like. It is that, when the King's grants are upon a valuable consideration, they shall be construed favorably to the patentee for the honor of the King."

And in the same case in the Supreme Court of the United States, Judge McLean says:

"The general rule is that 'a grant of the King at the suit of the grantee is to be construed most beneficially for the King and most strictly against the grantee,' but grants obtained as matter of special favor of the King or on consideration, are more liberally construed."

And to the same effect are the observations of Story, J., page 589, where he says that the rule never did apply to grants made by the sovereign for a valuable consideration.

In 3 Washburn on Real Property, 3rd Ed. 172, the learned author says:

“This strictness of construction in favor of the sovereign and against the subject, applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor as it seems, is the rule applicable where the grant is for a valuable consideration. In such cases the rule of construction between the Government and the subject is the same as between private grantors and grantees.”

In *Moon v. Salt Lake County*, 27 Utah, 436-443, where the construction of a railroad grant was under consideration, the Court said:

“That all such legislation by Congress was designed to enhance the interest of the Government as well as to aid such enterprises is apparent from the terms of the various grants for railroad purposes. At the times when the several acts in aid of intermountain and transcontinental railroads were passed there were yet immense tracts of public lands unsettled and uncultivated—doubtless recognizing the fact that railroads are most powerful instruments to promote civilization and upbuild a country Congress intended to adopt a policy of liberality in enactments of the kind under consideration to induce capital to engage in the building of such roads over the public domain and thereby reclaim and render habitable and productive a section of country hitherto almost valueless—little

more than a barren waste. That the policy of the Government has been productive of great public benefit can scarcely be doubted when it is considered that acres of the public domain have been rendered accessible by the railroads which obtained the grant and constitute the homes of multitudes of citizens who add materially to the public revenues, and that postal, military and other Government service may now be carried on in this intermountain region with the same facility as in other parts of the country. In construing acts making grants of such character offering inducements to individuals and corporations to engage in such expensive quasi public enterprises, the Courts will, without hesitation, look into the condition of the country, the circumstances existing at the time of their passage and the purposes to be accomplished, and will give such construction as will carry out the designs of the law-making power."

In the case from which this citation is taken, the question was whether the grant of a right of way to Salt Lake City included the right of entry into the city and upon public lands within its limits, and the Court gave the statute a liberal construction. These views find support in the following cases:

Wis. Cent. v. Forsythe, 159 U. S. 55.

Winona & St. P. R. v. Barney, 113 U. S. 613.

Railroad Co. v. United States, 103 U. S. 426.

United States v. Choctau, 3 Okla. 479.

U. S. Trust Co. v. Atlantic, 8 N. Mex. 690.

It is a circumstance of striking significance in this case that the grant made by the Act of 1866 was upon a consideration of services to be rendered for an indefinite period of time and of a value which must ultimately vastly exceed the value of the lands granted, however largely the lands might increase in value; that this land grant, with two other small grants in the State of California (since forfeited) were the only ones made by Congress upon such consideration, or in consideration of any services to be gratuitously rendered to the Government.

Counsel for the Government in their elaborate brief presented to the Court below, have enumerated all the grants made by Congress for public improvements, including those made in aid of railroads (See pp. 429-433). It appears that there have been eight land grants made directly to corporations in aid of railroad construction, including the grants in question.

The Union Pacific grant (12 Stat. 489) required the railroad company to transport mails, troops, munitions of war and Governmental supplies at fair and reasonable rates of compensation.

The Northern Pacific grant (13 Stat. 365) contained a provision that the road should be a post route and a military road subject to the use of the United States for postal, military, naval and all other Governmental service, and also subject to such regulations as Congress may impose restricting the charges for such Governmental transportation.

In the grant to the Placerville & Sacramento Valley R. R. Co. (14 Stat. 94) it was provided that the

company should not charge higher rates to the Government than to individuals for telegraphic service. Then follows a clause identical with that in the Oregon grant.

In the grant to the Atlantic & Pacific R. R. Co. (14 Stat. 292) it was provided that the railroad should be a post route and military route subject to the use of the United States for postal, military, naval and other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

The grant to the Stockton & Copperopolis R. R. Co. (14 Stat. 548) was upon the same conditions of service as that to the Placerville & Sacramento Valley R. R. Co.

The grant to the Texas Pacific R. R. was subject to the use of the United States for postal, military and other Governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service.

It is further to be remarked that in none of the cases cited by the Government's counsel in which the rule of most favorable construction was adopted, was the question of the effect of an adequate and valuable consideration discussed.

Considerable importance was attached by the Court to the rule that legislative land grants are to be regarded not merely as contracts, but also as laws, and a number of cases are cited in support of this rule. (Schulenberg v. Harriman, 21 Wall. 44-62; Missouri, etc., Ry. Co. v. Kan. Pacific, 97 U. S. 491-497; St. P. N. & M. R.

Co. v. Greenhalgh, 26 Fed. 563-568). But that rule means only that, as in the construction of the statute, we are to look to the intention of the lawgiver, so in grants, which are also statutes, we are confined in construction to the ascertainment of the intention of the legislature. But how does that rule help in determining whether this proviso should be construed as a condition or as a covenant? That intent, as we have heretofore undertaken to show, is to be gathered from the entire legislation read in the light of its purpose and the circumstances attending it.

- (4) Neither previous nor subsequent legislation nor the proceedings in Congress indicate an intention that the proviso should constitute a condition.

In no land grant made by Congress previous to 1869 was any limitation placed upon the sale of lands. In the two Acts passed on April 10th, 1869 (the grant in question and the Act extending the Alabama Grant), a precisely similar proviso was inserted and a somewhat similar provision was inserted in the Coos Bay Wagon Grant (March, 1869). Subsequent to 1869 there were grants and extensions of grants made by Congress, none of which contained any similar provision, except the Act of 1870. While due regard must be given to the language of the proviso of the Act of 1869, there is nothing in previous or subsequent legislation or in the circumstances attending the passage of the Act of 1869, or its historical relation, which requires that it should be construed as a condition, inasmuch as the purpose

and object of the proviso can be as competely effected by construing it as a covenant.

Nor is anything found in the Congressional debates upon the subject which would lead to a different conclusion. The Act of 1869 was passed without debate. Counsel for the Government have stated that the Act as originally introduced simply extended the time for the filing of the assent, and in this form passed the Senate. When it "came before the House for consideration, Mr. Julian moved his amendment in the usual form, and it was agreed to by the House and concurred in by the Senate without objection and without explanation." (Brief for Government below, p. 478). There is nothing in the debates in Congress respecting other land grants to indicate that this clause was intended to operate as a condition, a breach of which would involve forfeiture of the entire land grant. In the course of the debate respecting the Act of 1870, it was proposed to amend the law, by adding the words "and any violation of this condition shall work a forfeiture of any lands which may remain unsold." This amendment was voted down (Globe Feb. 19, 1870, Globe 1423). Senator Thurman expressed a doubt as to whether the provision as it now reads would be effective, or whether it could be enforced. Attention was not called at any time in any of these debates in which the provisions for actual settlers were discussed to the precise legal effect of the restraint which some members of Congress believed should be imposed in such grants. We submit with entire confidence that if it be proper to determine the legal effect of the statute by reference to the language

used in debates in Congress (the proposition from which we dissent) still there is nothing found in the debates upon this subject which would justify the conclusion that it was intended by the proviso in question to create a *condition* subsequent rather than a restrictive covenant.

POINT IV

THE PROVISION OF THE ACT OF 1870 RESPECTING ACTUAL SETTLERS WAS NOT A CONDITION SUBSEQUENT.

The Act of 1870 was passed for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria and from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville, and it granted to the Oregon Central Railroad Company "now engaged in constructing the said road," a right of way one hundred feet on each side of the road, and also each alternate section of the public land, not mineral, designated by odd numbers, reserving the Pre-emption and Homestead rights, and providing for indemnity lands. By the fourth section of the act it is provided as follows:

"That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, etc., shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres, or a quarter section, to any one settler, and at prices not exceeding \$2.50 per acre."

The fifth section of the Act provided that the company should, by a mortgage, appropriate and set apart all the net proceeds of the sales as a sinking fund to be invested in United States Bonds, or other safe and more productive securities, for the purchase from time to time and redemption at maturity of the first mortgages construction bonds of the company on the road, depots, stations, side tracks and wood yards, not exceeding \$30,000 per mile, and no part of the principal or interest was to be applied to any other use until the bonds had been purchased or redeemed. The District Court was given concurrent jurisdiction with the State Court to enforce the provisions of the section.

Section six provided that the company should file its assent within one year from the passage of the Act, and provided

“that the foregoing grant is *upon condition* that the said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date.”

Attention has already been called to the fact that the only condition in this Act is contained in the sixth paragraph and relates to the completion of the road.

The authorities are numerous and uniform to the effect that a condition subsequent is not created by a mere direction as to the use which shall be made of lands conveyed, where no apt words of condition are employed and there is no provision for reverter. This conclusion rests upon the general principle that condi-

tions are not favored and are to be strictly construed. This rule of construction is so well established that it seems to be unnecessary to do more than refer to general treatises where the authorities are collected (2 A. & E. Enc. 2nd Ed. Vol. 6, p. 502). The learned judge who wrote the opinion in the Court below, referring to this grant, says:

“That while the provision relating to actual settlers does not contain the same words indicative of a condition subsequent as the amendment to the East Side Grant, the provisions of Section 5 show very clearly the purpose of Congress.”

He bases his conclusion that the fourth clause is a condition subsequent upon considerations drawn from the provisions of the fifth section. That section, he says, does not authorize a mortgage of the land grant, but simply of the right of way, depots, etc., and attempts to provide for the application of the proceeds of the land grant for the redemption and retirement of the bonds secured by such mortgage; this indicates, he thinks, that the company was not to be at liberty to sell the lands on its own terms, and he proceeds to the conclusion that because the counsel for the railroad company urged that the settlers' clause “was a mere directive covenant,” which he thinks to be unsound, and because it was the intention that the legislation should be effective, therefore, he reaches the conclusion that the purpose of Congress was to create a condition subsequent. An analysis of this opinion shows that the reasoning is simply this—that the clause must be construed

to be a condition subsequent, because otherwise it could not be made effective. But, as we have shown above, if this clause be regarded, as we think it should be, as a restrictive covenant applicable only to agricultural lands, there can be no doubt of the power of the Government to enforce such a restriction, nor can there be any doubt that the remedies available therefor in a Court of Equity are entirely adequate. We think, therefore, that the argument upon which the learned judge based his conclusion is plainly untenable, and that under ordinary rules of construction the absence of words of condition in the fourth section and the presence of such words in the sixth section, must be held as indicative of an intention on the part of Congress to distinguish in the character of the two provisions a breach of the latter of which should be ground of forfeiture but not of the former—*expressio unius, est exclusio alterius*.

POINT V

THE PROVISIONS OF THE ACT OF 1869 AND
OF THE ACT OF 1870 RESPECTING
ACTUAL SETTLERS ARE RESTRICTIVE
COVENANTS AND IF ENFORCEABLE AT
ALL ARE ENFORCEABLE IN A COURT
OF EQUITY AS TO LANDS SUSCEPTIBLE
OF SETTLEMENT AND CULTIVATION
ONLY.

The bill of complaint is framed with a double aspect. It seeks relief either by forfeiture, or by adjudication

that the unsold lands are subject to sale to actual settlers upon the terms prescribed, and for the enforcement thereof by receivership or injunction. The former relief can be afforded only upon a finding that the words of the Act relating to actual settlers constitute a condition. The latter relief can be afforded only upon a finding that the provisions referred to constitute a covenant.

We proceed to a consideration of the question whether regarding the provisions of the Statutes of 1869 and 1870, relating to actual settlers as covenants, and assuming that a breach or threatened breach of these covenants has been shown by the evidence, a Court of Equity has jurisdiction to enjoin the breach.

The language employed in each of the Acts, with the exception of the word "provided" in the Act of 1869, is substantially similar. Counsel for the Government, referring to the proviso in the Act of 1869, say:

"The terms of this provision are prohibitive and not compulsory, that is, it prohibits sales except with the maximum limitations imposed. Each of the limitations is in the negative form—'actual settlers,' 'quantities not greater,' 'prices not exceeding.'" (Brief p. 154).

In this characterization of the provision, we agree with the counsel for the Government. The stipulation is unquestionably negative. It would not be reasonable to suppose that the Government imposed an affirmative duty upon the railroad that it intended to compel it to find actual settlers and to sell the lands to them. It did

not intend that the railroad company should be placed under an affirmative obligation to people the country. It meant to leave that to natural processes, prohibiting the railroad from selling agricultural lands to persons other than actual settlers upon terms other than those prescribed.

Under such circumstances, the jurisdiction of a Court of Equity upon a breach or threatened breach of the covenant to enforce performance by enjoining a violation of the covenant, cannot be doubted.

Chicago & A. Ry. Co. v. N. Y. L. E. & W. R.
Co. 24 Fed. 516.

Lumley v. Wagner, 1 DeG. M. & G. 604.

Andrews v. Kingsbury, 212 Ill. 97.

Singer Sewing Machine Co. v. Union Button-
hole Embroidery Co. 22 Fed. Cas. 12,904.

Wolverhampton & Walsall Co. v. London &
N. W. R. Co. L. R. 16 Eq. 433.

Doherty v. Allman, 3 App. Cas. 709.

Waskey v. M'Naught, 163 Fed. 929.

The jurisdiction of Courts of Equity to restrain the violation of negative covenants is not dependent upon the form of the covenant or the phraseology employed, but wherever the covenant is of such a character that an injunction restraining its breach will enforce the rights of the parties, then a Court of Equity has jurisdiction. Judge Lowell stated the underlying principle

in *Singer Sewing Machine Co. v. Union Buttonhole Embroidery Co.*, *supra*, as follows:

“I think the fair result of the later cases may be thus expressed. If the case is one in which the negative remedy of injunction will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the Court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it.”

The same doctrine was stated in *Wolverhampton & Walsall Co. v. London & N. W. R. Co.*, *supra*. In that case, by agreement confirmed by Act of Parliament, the plaintiff agreed to construct a line of railway, and the defendant company agreed to work it and during the continuance of the agreement to develop and accommodate local and through traffic. The defendant company diverted a large part of its traffic over other lines. It was held that the Court could interfere by injunction.

Referring to the rule in *Lumley v. Wagner*, *supra*, respecting the enforcement by injunction of negative stipulations, Lord Selborne said:

“I can only say that I should think it were the safer and better rule if it should eventually be adopted by this Court to look in all such cases to substance and not to the form. If the substance of the agreement is such that it would be violated by

doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend upon a negative rather than on an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that form ought to be changed by the use of the negative rather than an affirmative."

Counsel for the Government seem to have thought that because the United States sought no pecuniary advantage to itself from the provisions referred to, and therefore could recover no damages for a breach, that the Government had no enforceable remedy. But the jurisdiction of a Court of Equity in such cases does not depend upon the showing damage. Indeed, the very fact that the injury is of a public character and such that no damage could be calculated, is an added reason for the intervention of equity.

Langdon v. The Supreme Council, 174 N. Y. 266.

Brown v. King, 101 Calif. 295.

Attorney Gen'l v. Algonquin Club, 153 Mass. 447. 22 Cyc. 859-860.

Elliott on Contracts, Sec. 2, 490-2, 528.

It follows that since, as we have seen, the provisions of the Acts of 1869 and 1870 respecting actual settlers are covenants prohibiting the railroad company from selling lands susceptible to actual settlement to per-

sons other than actual settlers, if violations or threatened violations of these covenants have been shown, a court of equity may grant equitable relief enjoining such violations.

POINT VI

NO EVIDENCE WAS SUBMITTED OF A BREACH OF THE PROVISIONS OF THE ACT OF 1869 OR OF THE ACT OF 1870 REGARDING ACTUAL SETTLERS, WHETHER THEY BE REGARDED AS CONDITIONS OR COVENANTS, WHICH JUSTIFIES THE DECREE HEREIN OR REQUIRES ANY DECREE IN FAVOR OF THE COMPLAINANT.

The complaint alleges four breaches of these provisions.

First: The giving of a mortgage upon the lands granted in 1881 by the railroad company to secure the payment of bonds issued to provide money for constructing the road.

Second: The giving of another mortgage in 1887 by the company for the same purpose covering the land grant.

Third: Sales of lands within the grant commencing in 1894 and continuing until 1903, which, it is alleged, were in substantial violation of the terms of the proviso.

Fourth: The withdrawal from sale on January 1st, 1903, of all the lands, the subject of this suit, and the continuance of the refusal since to sell any of these lands.

While the Court below made no specific findings, the opinion pronounced upon the direction for a decree stated as the grounds of decision respecting a breach of the provisions, the facts stipulated by the parties, to-wit: that from about 1894 to 1903 the Oregon and California Railroad Company had sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding \$2.50 per acre, and in several instances between said dates, the said company sold lands of said grant in quantities from 1,000 to 20,000 acres to one purchaser, at prices ranging from \$5 to \$20 per acre, in one instance at \$35 per acre, and in one instance at \$40 per acre, and in one instance a sale of 45,000 acres at \$7.50 an acre, was made by the company to a single purchaser. He recites also the fourth and sixth items of subdivision VIII of the stipulation as to the facts with regard to the sales of the lands, to the effect that out of 5,306 sales, aggregating 820,000 acres, approximately 4,930 were for quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres, and approximately 376 for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. That substantially all of these 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of \$2.50 an acre. Approximately 478,000 acres of the 524,000 were sold since 1897, and that approximately 370,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser.

The decision also recited the further stipulation that

“On or about January 1st, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands; and the said company at all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding Item 3 of this Subdivision hereof, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose.”

The Court said that these stipulations showed that the Company had violated the provisions, first, in selling large quantities of these lands in tracts exceeding 160 acres to a single purchaser, and for prices largely exceeding \$2.50 per acre, and in withdrawing these lands from sale.

The Court did not hold that the execution of the mortgages in 1881 and 1887 were violations of the provisions of the grant. It is unnecessary, therefore, to deal with these alleged grounds of breach.

We confine ourselves to a consideration of the specifications of breach stated by the Court.

In the first place, we observe that the party who undertakes to work a forfeiture for a breach of condition subsequent, assumes the burden of establishing with strictness and certainty the facts entitling him to such forfeiture.

“A condition when relied upon to work a forfeiture is construed with great strictness. The

grantor must stand on his legal rights and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture." *New York Indians v. United States*, 170 U. S. 25.

If we are right in the construction which we think should be placed upon the provisions respecting "actual settlers," and they are limited to lands capable of settlement and cultivation, not including timber lands, then it becomes necessary for the plaintiff to show that the Railroad Company in the case of each grant had sold lands which were capable of cultivation and settlement and were not timber lands, to persons who were not actual settlers, in amounts in excess of 160 acres to one person, and at prices greater than \$2.50 per acre. No such proof was submitted; no evidence was offered that any sale had at any time been made by the Railroad Company of lands included in either grant which were capable of settlement and cultivation to persons other than actual settlers, or in quantities greater than 160 acres to one purchaser, or at prices in excess of \$2.50 per acre. There was no stipulation to that effect. On the contrary, the evidence, so far as it goes, tends to show that in the instances of land sold in considerable quantities and at prices in excess of \$2.50 an acre, the lands were timber lands sold to timber operators and purchased because of the merchantable timber standing

upon them; and this is corroborated by the evidence that only a meagre fraction of the unsold lands are susceptible of cultivation. The Government stands upon its strict rights. It calls for the most severe construction of the law; it proposes to take back the lands which it has granted, while it retains its right for all time to exact the large and valuable services which the Company undertook to render as compensation for the lands. It is only right that it should be held to the strict letter of the law; that it should be required to prove its case with every shade of nicety necessary to drive a Court of Equity into the enforcement of its demands.

We submit that it is impossible to find in the record the facts establishing a breach of the provisions of the Act of 1869 or of the Act of 1870 respecting actual settlers if they are construed as we insist they should be.

We come then to the next ground of breach propounded by the Court, namely, the withdrawal of the lands from sale. The defendant admits that about January 1st, 1903, the unsold lands were withdrawn from sale pending investigation of the Land Department transactions of the Oregon and California Railroad Company (Answer, Subdivision XII). The evidence is that the sale of lands was suspended because of the confusion into which the titles of the lands had fallen. This grew out of several circumstances. One was that the donation lands had been granted before the country was surveyed; that there was still a large body of land unsurveyed and of which there were no field notes (Mr. Eberlein's testimony, pp. 2233-36). The work of examination was begun in the Spring of 1903 and

completed in the Fall of 1904. Advertisements were then published saying that the lands would soon be opened for sale (2253-2258), but the work was further delayed by the examination of the tax titles (2238-40). On April 18, 1906, the earthquake and fire at San Francisco destroyed all the records of the Land Department. The tract books, deed records, sales record and every book and scrap of paper, and the outstanding contracts were entirely destroyed. The Company was then without any means of transacting the land business.

In the Summer of 1906 notice was given that the Railroad Company would sell agricultural lands, but that as to timber lands they were not in a position to make sales. The reason for the exclusion of the timber lands from sale at that time was because they were then engaged in cruising (2258) and the evidence is that no application was made for lands except such as had timber (2259). The complaints which were made and which instigated the bringing of this suit were not that the Company had sold lands to persons other than actual settlers, or that they had sold lands in quantities in excess of 160 acres to one purchaser, or that they had sold lands for prices in excess of \$2.50 an acre, but that they had withdrawn the timber lands from sale, and thus had prevented the acquisition of such lands by timber companies. This is the testimony of both Mr. Booth and Mr. Dixon, who are interested in the Booth-Kelly Lumber Company.

There is no evidence of any intention to withdraw the lands permanently from sale. There is no reason

to doubt the correctness of the reason given for the temporary withdrawal, and it is perfectly apparent that since the agitation over the terms of the grant in 1906, there was necessarily a cessation of sales on account of the uncertainty of title, for no purchaser could be sure that his title would not be divested by a forfeiture.

The covenants, however, were simply prohibitive and not compulsory. The Railroad Company was obligated not to sell to persons other than actual settlers, but it was placed under no condition to sell to actual settlers, much less to sell to any particular person who claimed that he desired to become an actual settler. This is in accordance with the rule which we have frequently referred to, that words, which it is claimed constitute a condition, must be strictly construed; and it is in accordance with the construction placed by the Government upon the words of the proviso. Thus, in the brief presented on behalf of the Government it is said:

“In the case at bar, observance of the condition would consist in refraining from making sales to others than actual settlers, in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre. The thing prohibited was specifically stated in language which is not susceptible of any doubt or uncertainty.” (Brief for Government on demurrer, p. 226.)

The Decree should be reversed and a Decree should be directed dismissing the Bill of Complaint.

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors and Attorneys for Union Trust Company
of New York.

JOHN C. SPOONER,
JOHN M. GEARIN,
of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES,"
her tackle, apparel and furni-
ture,

Appellee.

No. 2402

BRIEF OF APPELLEE

RICHARD A. BALLINGER,
ALFRED BATTLE,
ROBERT A. HULBERT,
BRUCE C. SHORTS,

Proctors for Appellee.

901-7 Alaska Building,
Seattle, Washington.

FILED

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within the admiralty and maritime jurisdiction, as follows, to-wit:

(1) An action *in rem* by libellant, a seaman, to recover damages for personal injuries sustained by him at sea, aboard a seaworthy vessel;

(2) An action *in rem* by libellant, a seaman, to recover damages for an alleged breach of the owner's duty, under the maritime law, to furnish the seaman injured aboard a seaworthy vessel at sea, with proper medical care;

(3) An action *in rem* by libellant, a seaman, to recover wages;

(4) An action *in rem* by libellant, a seaman, to recover money paid by him for medical treatment of personal injuries sustained by him aboard a seaworthy vessel at sea.

To the first purported cause of action appellee (claimant) filed exceptions as follows:

"To all such allegations in said amended libel as are allegations of facts purporting to constitute such first purported cause of action, for the reason that such a cause is not an admiralty and maritime cause of action, and is not within the jurisdiction of this honorable court, and for the reason that said amended libel does not allege facts sufficient to constitute such cause of action."

To the second purported cause of action appellee filed exceptions as follows:

“To all such allegations in said amended libel as are allegations of facts purporting to constitute such second purported cause of action, on the ground that such amended libel does not allege facts sufficient to constitute such a cause of action.”

These exceptions were sustained and appellant assigns as error, first, the action of the court in sustaining said exception to said first purported cause of action, and second, the action of the court in sustaining said exception to said second purported cause of action.

The allegations of the amended libel upon which appellant relies as setting forth facts sufficient to constitute said first and second causes of action, are set forth at length on pages 2, 3, 4 and 5 of appellant's brief.

ARGUMENT.

(a) First assignment of error. Appellant in his brief makes no argument whatsoever and cites no authorities in support of his first assignment of error; hence we may assume he has abandoned his desire to press this point further. We feel that the opinion of Judge Neterer sustaining appellee's

exception to said purported first cause of action so clearly sets forth the law applicable to the facts alleged in said first purported cause of action and so fully cites and reviews the authorities establishing such law, that we can add nothing by way of argument in support of that opinion. We might add in the words of this court, quoted from the case of *Olson vs. Oregon Coal & Navigation Co.*, 104 Fed. 574:

“There is no averment in the libel tending to show that the ship was not properly equipped with all necessary and appropriate appliances or that she was not properly manned or not entirely seaworthy. Or that there was any neglect on the part of the defendant in the selection of the officers or crew of the ship.”

Appellant's charge of negligence against appellee is:

“Libellant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack and that everything was all right, and to let go, and libellant let go. * * * The wire was tight and sprang back and hit libellant.”

Assuming the captain was negligent, as charged, and that appellant was injured thereby as charged, still it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were

engaged; and as said by Judge Neterer in his opinion, "For such negligence of any member of the crew, whether seaman or captain, the owner is not liable, and the vessel cannot be proceeded against *in rem*."

The Osceola, 189 U. S. 158; 47 L. Ed. 760;

Olson vs. Oregon Coal & Nav. Co., 104 Fed. 574;

The Queen, 40 Fed. 694;

Quinn vs. Lighterage Co., 23 Fed. 363;

The Governor Ames, 55 Fed. 327;

The Bunker Hill, 198 Fed. 587;

The City of Alexandria, 17 Fed. 390;

The C. S. Holmes, filed Dec. 31, 1913, 209 Fed. 970.

(b) Second assignment of error. In sustaining the exception of appellee (claimant) to the original libel, Judge Neterer said:

"It is the duty of the owner to furnish an injured seaman with proper medical care, and the master represents the owner with respect to this duty, and the owner is liable for the negligence of the master in that regard.

"Where the master employs a physician, is the owner liable in all events for the negligence of that physician, or is he liable only where the master fails to exercise reasonable care in selecting the physician? No case in admiralty which decides that question has been found; it must be determined upon reason and analogy.

having regard to the nature and character of the duty imposed.

“ ‘It is well settled that a master has performed his entire duty in respect to furnishing medical attention to a servant injured while at work, when he employs a person of ordinary competency and skill in the profession; and having done so, he cannot be made liable for the carelessness of his duties. So, too, where a hospital is maintained by a master for the sole purpose of relieving injured servants, without any intention of profit to himself, he is not liable to his servants for the malpractice of the physician employed, if ordinary care was exercised in selecting him, although the hospital is supported by the contributions of the servants.’

“*26 Cyc.*, 1082.

“The owner’s duty cannot be analogous to the obligation of the employer who makes a profit in furnishing medical attendance, for the shipowner makes no profit, and is not required to keep a physician on board the vessel. The duty is one which arises out of or is governed by the circumstances of each particular case, and it is only for the negligence of the owner himself, or the owner’s representatives, the master, that the vessel can be held. The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and entrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment.

“The libel does not allege that the master knew of the incompetency of the physician, or that he should have known of such incompetency and failed to exercise reasonable diligence

in selecting him. The libel alleges that the master represented to the doctor that he would be paid for his services through the marine hospital, and that three days thereafter the doctor informed libellant that the master's representations were false. There is no allegation that these representations were untrue, or that the doctor manifested any unwillingness to the master to accept such terms of employment; nor are the doctor's statements binding upon the master of the vessel. The libel also alleges that the master took libellant to Port Angeles to a private doctor when libellant had requested to be taken to Port Townsend to the marine hospital. This cannot of itself constitute negligence, since it is manifest that an injured seaman cannot in every instance have the choice of physicians, regardless of expediency or expense. The master's duty to the owner requires that he should take such matters into consideration, and while the humane duty to the seaman should have the greater weight, the master cannot be said to be negligent when he exercises reasonable diligence in employing a physician whom he believes to be competent to attend to the seaman's injuries. For all that appears in the libel the master may have believed that the libellant would receive treatment as much calculated to effect a cure from the physician in question as from the marine hospital. Where there is no negligence of the master, the physician's negligence cannot be imputed to him or to the owner, and the vessel cannot be proceeded against *in rem*."

And in sustaining the exceptions of the appellee to the said purported second cause of action set forth in the amended libel, Judge Neterer in

his opinion says:

“In the former opinion in this case it was held that the owner is liable for the negligence of a physician employed by the captain only when the master is negligent in employing him. The duty was there held analagous to that of selecting a competent fellow servant, where the master is held liable only when he knew or should have known of the incompetency of the fellow servant.

“*26 Cyc.*, 1295, 1298.

“It was stated that the mere act of not going to Port Townsend to take libellant to the marine hospital would not be negligence. The question then remains whether in the employment of this particular physician there was such negligence as to charge the owner. It is nowhere alleged that the master knew of the physician's incompetence, nor are any facts alleged sufficient to charge him with knowledge. It is alleged that the master gave the physician a permit to the marine hospital, telling him that it was good for all expenses, when the captain knew that it was valueless for any other purpose than admission to the hospital. It is then alleged that ‘in the presence of the captain an attempt was made by the then *unwilling* doctor to fix him up temporarily.’ Only by the most liberal inference can the missing links between the representations of the master and the malpractice be supplied. It can be only by reading into the libel allegations that the *unwillingness* caused the malpractice, and that the unwillingness was caused by the falsity of the representations. The word ‘unwilling,’ as applied to the doctor, expresses a conclusion as to a state of mind, and no words or acts of the doctor are

alleged which manifested to the master such a state of mind. It is evident that the physician accepted the employment and undertook to minister to libellant. Even had he done so gratuitously, there rested upon him 'the same degree of care and skill and the same measure of duty' as would have rested upon him had he received compensation.

"22 *Am. & Eng. Enc. Law*, 801.

"Here he had not only the liability of his patient, but that of the owners and the vessel as well, upon which to rely.

"*The Osceola*, 189 U. S. 158;

"*The New York*, 204 Fed. 764;

"*The City of Alexandria*, 17 Fed. 390.

"A misrepresentation as to the method of payment, under such circumstances, cannot be reasonably anticipated to result in malpractice. It is not such negligence or fault as will charge the vessel. The other allegations are merely of conclusions, from which no implication of negligence is necessarily drawn, and are to be disregarded.

"*Strauss vs. Fox*, 34 S. C. R. 42;

"*Jackson vs. Chicago, Mil. & St. Paul Ry.*,
filed in this Court Feb. 2, 1914."

There is no charge in the amended libel that the master, following the accident, neglected to properly put his ship about and return to port to procure medical aid for the injured seaman. On the contrary the amended libel alleges in Article III that the accident happened about 7:00 o'clock in the evening, on the high seas, a considerable distance

off Cape Flattery, and further expressly alleges in Article IV that the captain gave orders to go back to Port Angeles, where they arrived about 3:00 o'clock the following morning; and that by 7:00 o'clock the captain had taken the injured man ashore, had secured the attendance of Dr. Taylor and had placed the injured man under his care.

There is no charge in the amended libel that Dr. Taylor was not a physician and surgeon regularly licensed and practicing under the laws of the State of Washington; there is no charge that he was an incompetent physician and surgeon, or is there any charge that the captain could with reasonable investigation or inquiry, have determined anything derogatory to the personal or professional reputation of Dr. Taylor; hence it may be assumed that Dr. Taylor was a regularly licensed and practicing physician and surgeon, having a good standing and reputation as such in Port Angeles and vicinity.

The captain is not charged with neglect of duty in taking appellant to Port Angeles, rather than continuing on up the straits to Port Townsend and placing him in the hospital there, although it is charged that the captain refused the request of appellant that he be taken to Port Townsend; but we

submit that in putting into Port Angeles the master strictly complied with the duty resting upon him at the time, that is, the duty to put into the nearest port where medical assistance could be obtained, and we do not think any reasonable person would have any reason to doubt that proper medical care and treatment for one suffering from a broken arm could as well be obtained in Port Angeles as in Port Townsend.

And in determining what port he should put into, it was the duty of the master to at least consider the expense to the owners of his vessel and her cargo. We quote from the opinion of Justice Brown in the case of "*The Iroquois*," 194 U. S. 240; 48 L. Ed. 955:

"Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be

seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

The captain having reasonably exercised his discretion in the premises in putting into Port Angeles, and having used reasonable care in securing a physician and surgeon to treat the injured seaman, we know of no law which imposes upon the ship liability for the neglect of the physician in treating his patient. It was held in the case of *Campbell vs. Frank Gilmore*, 43 Fed. 318:

"Neither are they (the owners of the vessel) at all responsible for the treatment which libellant's injured leg received at the marine hospital."

In his opinion in this case, Judge Neterer says that the duty resting upon the ship and her owners to furnish medical attendance to an injured seaman is analogous to the duty of one who collects fees from his employes and undertakes to furnish medical treatment without making a profit therefrom.

In the case of *Union Pacific Ry. Co. vs. Artist*, 60 Fed. 365, Judge Sanborn, of the Eighth Circuit,

in his opinion reviews the authorities on this point, and announces the law as follows:

“It would be a hard rule, indeed—a rule calculated to repress the charitable instincts of men,—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them. *McDonald vs. Hospital*, 120 Mass. 432; *Insurance Patrol vs. Boyd*, 120 Pa. St. 624, 647, 15 Atl. 553; *Van Tassell vs. Hospital* (Sup.), 15 N. Y. Supp. 620, and note; *Glavin vs. Hospital*, 12 R. I. 411; *Laubheim vs. Steamship Co.*, 107 N. Y. 228, 13 N. E. 781; *Secord vs. Railway Co.*, 18 Fed. 221; *Richardson vs. Coal Co.* (Wash.), 32 Pac. 1012.”

Another case which we believe strictly in point is that of *Laubheim vs. Netherland S. S. Co.*, 107 N. Y. 228, 13 N. E. 781. In that case plaintiff took passage on the S. S. “Stella,” belonging to the defendant company, and during the voyage sustained personal injuries. The surgeon aboard the vessel, employed by the steamship company, took charge of

plaintiff and operated upon the injured part. Plaintiff brought suit against the company for damages for alleged improper and negligent treatment by the ship surgeon. No negligence upon the part of the company in selecting the surgeon was shown, and the action was dismissed, the court saying:

“If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passenger was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. *Chapman vs. Railway Co.*, 55 N. Y. 579; *McDonald vs. Hospital*, 120 Mass. 432; *Secord vs. Railway Co.*, 18 Fed. Rep. 221. It is responsible solely for its own negligence, and not for that of the surgeon employed. In performing such duty, it is bound only to the exercise of reasonable care and diligence, and is not compelled to select and employ the highest skill and longest experience.”

We respectfully submit that the trial court committed no error in sustaining appellee’s exceptions to said first and second purported causes of action set forth in said amended libel, and that the judgment should be affirmed.

RICHARD A. BALLINGER,
ALFRED BATTLE,
ROBERT A. HULBERT,
BRUCE C. SHORTS,

Proctors for Appellee.

United States Circuit Court of
Appeals
FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant.)

vs.

SCHOONER "C. S. HOLMES," her
tackle, apparel and furniture,

Appellee.)

BRIEF OF APPELLANT

DANIEL LANDON,

Proctor for Appellee *at*

1055 Empire Bldg., Seattle, Wash.

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United States Circuit Court of
Appeals

FOR THE NINTH CIRCUIT

GUST FONDAHN,

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Appellee.)

BRIEF OF APPELLANT

STATEMENT.

The amended libel of appellant purported to set out four causes of action, namely: First, recovery for damages for personal injury; second, damages for negligence in furnishing medical treatment; third, expense of medical treatment, and fourth, wages. The matter was before the lower court upon appellee's exceptions to amended libel. The court there sustained the exceptions of appellee

against the amended libel upon the first two causes of action and overruled all other exceptions. This is an appeal from the court's ruling upon sustaining the exceptions to the first two causes of action.

Upon the first point the amended libel is as follows:

"That while on the return voyage and while performing his duty as a seaman, on the third of January, 1913, in the afternoon, a heavy storm arose and the ship sought shelter in Neah Bay. A tug was sent out to look at the condition of the weather, and came back and reported that it was not fit for any vessel to go out on account of the mountain of sea running at twelve o'clock noon. With the weather conditions unchanged the Steamer Goliah gave the said 'C. S. Holmes' a steel cable of five inches thickness which was taken on board and made fast on the forward end of said ship by being placed three times around a square bit; and by order of the captain of the said ship 'C. S. Holmes,' the Steamer Goliah towed her to sea, it taking the steamer seven hours to tow the 'C. S. Holmes' a distance of eight miles.

"That at about seven o'clock and while weather conditions were unchanged the said steamer blew whistle to let go the wire; the captain of the 'Holmes' gave general orders for everybody to go forward and take hold of the wire; the crew held back; when they received the orders the second time everybody went forward, but none went to the wire except the libelant; the captain standing about four feet above the

libelant where he could see everything going on; libelant being in a position where he could not see the condition of the wire, libelant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack and that everything was all right and to let go; and libelant let go the lashings and went away as quickly as possible to avoid danger. The wire was tight and sprang back and hit libelant, causing a compound fracture of libelant's right arm, paralyzing and bruising his side."

To this cause of action above set out the appellee excepted as follows:

"Claimant excepts to all such allegations in said amended libel as are allegations of facts purporting to constitute such first purported cause of action, for the reason that such a cause is not an admiralty and maritime cause of action, and is not within the jurisdiction of this honorable court, and for the reason that said amended libel does not allege facts sufficient to constitute such cause of action."

The second cause of action, that is, the allegation charging negligence on the part of the captain in furnishing medical treatment, in the amended libel, is as follows:

"That the captain gave orders to go back to Port Angeles; libelant requested to be taken to Port Townsend to the marine hospital, but was informed that it would cost \$100 to do so, and

that there was a marine doctor at Port Angeles and so refused; they arrived at Port Angeles at three o'clock in the morning; the libelant again requested to be taken to Port Townsend to the marine hospital and the captain took libelant to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was good for all expenses incurred; the said doctor asked the captain to explain the permit; the captain then told him, 'I have nothing to explain; the man is in your care now and he is out of my hands,' at the same time laughing at the doctor in a manner which would indicate that he had knowingly deceived him. The captain knew all the time that there was no marine doctor at Port Angeles, and that the permit was valueless for any purpose other than to be used for admission at the Port Townsend marine hospital. The captain deliberately put libelant off at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief; at the same time he knew or should have known that libelant needed prompt and permanent attention on account of the condition of his injuries.

"That the libelant was taken to the office of the doctor and in the presence of the captain an attempt was made by the then unwilling doctor to fix him up temporarily, which was not successful, and two days later while libelant was still in a helpless condition the doctor requested the libelant to leave; libelant was unable to move; he received no more attention or treatment for six days longer, when with considerable of effort he made his way to Port Townsend;

during the time he was at Port Angeles blood poison set in and after two months' treatment at the marine hospital at Port Townsend an attempt was made to set the bones, but the ends of the bones so broken had commenced to decay by reason of treatment being neglected when injured and the arm was in such condition that the plates used to hold the bones together broke loose and the bones are still continuing to decay."

Appellee excepted to the above cause of action, as follows:

"To all such allegations in said amended libel as are allegations of facts purporting to constitute such second cause of action on the ground that such amended libel does not allege facts sufficient to constitute such a cause of action."

ASSIGNMENT OF ERRORS.

First, the court erred in sustaining claimant's exception to libelant's first cause of action as set forth in his amended libel.

Second, the court erred in sustaining claimant's exceptions to libelant's second cause of action as set forth in his amended libel.

ARGUMENT.

There are two questions presented to the court. First, being a purely legal question whether or not a ship can be held in rem for the negligence of the

master to a seaman; second, whether the amended libel states a cause of action for negligence of the captain in furnishing medical treatment.

Regarding the second cause of action the amended libel alleges that the libelant had both bones of his right arm broken and paralyzed and bruised on his side; that after the injuries the captain put the ship back to Port Angeles, arriving there at about the hour of three o'clock in the morning. He remained aboard the vessel until seven o'clock when the libelant was taken before a doctor at Port Angeles and later temporarily attended to in the presence of the captain; that the captain attempted to deceive the doctor by giving him a permit, the captain knowing that the permit was valueless only for the purpose of being admitted to Port Townsend where the marine hospital is located; that the wound was of such a nature that it needed prompt and permanent attention.

Incidentally the amended libel further charges that the libelant requested the captain to take him to Port Townsend to the marine hospital; that the captain said it would cost one hundred dollars to so do and that the doctor was an "unwilling" doctor.

Libelant's condition, as alleged in the amended libel, is that each end of both bones of his right arm are decaying, that being the result of the neg-

lect in not receiving proper attention at Port Angeles. The question naturally arises who was responsible for that condition. We submit that there can be but one answer according to the allegations of the amended libel and that is, the captain. We venture to say that the decisions failed to disclose a more aggrieved case of want of proper treatment by the captain than was received in this case by the libelant.

The law of course is well settled that it is the duty of the master and owners to see that an injured seaman is properly cared for.

The Troop, 128 Fed. 856.

Respectfully submitted,

DANIEL LANDON,

Proctor for Appellee

United States Circuit Court of
Appeals

FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES," her
tackle, apparel and furniture,

Appellee.

APOSTLES ON APPEAL

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, NORTHERN
DIVISION.



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*In the District Court of the United States for the
Western District of Washington.
Northern Division.*

GUST FONDAHN,	Libelant,	} No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,	Respondent.	

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*In the District Court of the United States for the
Western District of Washington.
Northern Division.*

GUST FONDAHN,	} No. 2539.
Libelant,	
vs.	
SCHOONER "C. S. HOLMES," her	}
tackle, apparel and furniture,	
Respondent.	

STATEMENT.

TIME OF COMMENCEMENT OF SUIT.

August 29, 1913.

NAMES OF PARTIES.

Gust Fondahn, Libelant.

Schooner "C. S. Holmes," her tackle, apparel
and furniture, Respondent.

DATES WHEN PLEADINGS WERE FILED

Libel, August 29, 1913.

Exceptions to Libel, September 22, 1913.

Amended Libel, filed January 12, 1914.

Exceptions to Amended Libel, filed January 10,
1914.

ISSUANCE OF PROCESS AND SERVICE THEREOF.

Upon the filing in said cause of the original libel on the 29th day of August, 1913, a Monition was duly issued out of and under the seal of this Court, directed to the Marshal of the United States for the Western District of Washington, commanding said Marshal to admonish Claimant to appear at the Court Room of said District Court, in the City of Seattle, on the 18th day of September, 1913, then and there to answer the said libel and to make its allegations in that behalf. On the 6th day of September, 1913, said monition was duly returned by said Marshal into the office of the Clerk of said Court, showing service thereof by said Marshal, and that he released said Schooner on Notice of Bonding issued September 6, 1913.

OPINION.

Opinion on Exceptions to libel sustained, filed December 31, 1913.

OPINION.

Opinion on Exceptions to Amended Libel. Exceptions to First and Second Cause of Action Sustained, filed February 13, 1914.

FINAL ORDER.

Final Order, filed February 21, 1914.

NOTICE OF APPEAL.

Notice of Appeal, filed February 21, 1914.

*In the United States District Court for the Western
District of Washington. Northern
Division. In Admiralty.*

GUST FONDAHN,	Libelant.	} No. 2539.
vs.		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,	Respondent.	

LIBEL.

To the Honorable Judges of the Above Entitled
Court:

The libel of Gust Fondahn, of Port Townsend, Washington, late seaman of the American Schooner C. S. Holmes, whereof R. D. Trudgett, now is or late was master, against the said ship, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause for damage for personal injuries, civil and maritime, sheweth:

I.

That during the month of December, 1912, the libelant signed articles as an able seaman to make a trip on board the Schooner, C. S. Holmes, from San Francisco, California, to Everett, Washington, and return; that while on said voyage and while performing his duty as a seaman, on the 3rd day of January, 1913, at about the hour of

eight o'clock in the afternoon while the said schooner was being towed near Cape Flattery, the Captain of said schooner gave orders for the libelant to go forward and let go the tow line or sprig; that in pursuance of said order the libelant went forward and commenced to release the wire tow line or sprig, reaching from said schooner to the tug boat, in the presence of the captain and the rest of the crew; that in order to release the same it became necessary for the libelant to have assistance; that the Captain with the rest of the crew standing near by, negligently failed to insist upon giving libelant assistance; that libelant alone was unable to prevent said tow line or sprig from springing and the end of the same struck libelant with great force and violence causing a compound fracture of the right arm and injuring his back; that at the time plaintiff was injured as aforesaid the Captain of said schooner ordered the same to turn back to Port Angeles, at which port she arrived at three o'clock the next morning; that before landing at Port Angeles, this libelant requested the Captain to be taken to Port Townsend; that said Captain informed libelant that it would be too much expense to said schooner and that a marine doctor was located at Port Angeles; that after waiting some four hours at Port Angeles on board said ship, libelant, against his wish, was taken ashore where the Captain took him to a private doctor and repre-

sented to said doctor that he would be paid for his services through the marine hospital; that said doctor took charge of the case and immediately thereafter the Captain of said schooner informed the doctor that he, the libelant, was in the doctor's hands and off of his own; that about eleven o'clock that same forenoon, this libelant was chloroformed by the doctor and an attempt was made to set the bones broken; that by reason of the carelessness and negligence of the Captain of said ship in turning this libelant, against his desire, over to an inexperienced, incompetent, and unwilling doctor, the work was done in an unskillful and wholly improper manner.

II.

That after remaining at Port Angeles three days the said doctor requested this libelant to put on his clothes, informing him that the representations, made by the Captain to the doctor, regarding his pay, were false and he had better go to Port Townsend to the marine hospital; that libelant was unable to move or be moved and after remaining there several days longer, without proper attention he finally went to Port Townsend to the marine hospital; that at the time of arriving at Port Townsend, through the negligence and incompetency of said doctor at Port Angeles, the libelant's arm had become swollen and sore and he was

threatened with blood poison; that it was thought impossible by the doctor in charge at said marine hospital to set said bones before treatment was had to reduce the soreness and swelling; that after several days an attempt was made by the physicians and surgeons in said marine hospital at Port Townsend to set the bones, but owing to the fact that the ends had become infected and lost their power to knit, the work was unsuccessful and as a result of the treatment received as aforesaid the bones so broken will never knit together but will be a source of great annoyance, pain and suffering to libelant and said arm will always be entirely useless; that during all the time herein mentioned the libelant has suffered excruciating pain, humiliation and inconvenience, at times despairing of his life.

III.

That he was prior to said injuries an able-bodied, healthy person of the age of forty-five years, capable of and was earning the sum of \$45.00 per month and subsistence; that libelant will be to great expense in securing medical and surgical treatment for a long time to come. That ever since said injuries he has been and is now wholly incapacitated and as he believes will ever be so; that by reason of the matters set forth herein, libelant

has been damaged by the respondent in the sum of fourteen thousand dollars.

IV.

That said ship is now in Winslow Bay, and within the admiralty and maritime jurisdiction of this Honorable Court.

V.

That all and singular the premises are true and within the admiralty and maritime jurisprudence of this Honorable Court.

WHEREFORE, this libelant prays that process of attachment in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Schooner C. S. Holmes, her tackle, apparel and furniture; and that all persons having or pretending to have any right, title, or interest therein, may be cited to appear and answer all and singular the matters aforesaid; and that the said ship may be condemned and sold to pay the same, and that the said court will grant to this libelant such other and further relief as in law and justice he may be entitled to receive.

DANIEL LANDON,

Proctor for Libelant..

STATE OF WASHINGTON, }
County of King. } ss.

Gust Fondahn, being first duly sworn, on oath, deposes and says: that he is the libelant named in the foregoing libel; that he has read the same, knows the contents thereof, and believes the same to be true.

GUST FONDAHN.

Subscribed and sworn to before me this 17th
day of June, 1913.

(Seal) DAN LANDON,
Notary Public in and for the
State of Washington, residing
at Seattle.

Indorsed: Libel. Filed in the United States District Court, Western District of Washington, August 29, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States for the
Western District of Washington. Northern
Division. In Admiralty.*

GUST FONDAHN,	Libelant,	} No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,		
	Respondent.	

EXCEPTIONS TO LIBEL.

The exceptions of George E. Billings, the Claimant, as agent for and on behalf of the owners of the Schooner "C. S. Holmes" to the libel and complaint of Gust Fondahn against said schooner, alleges as follows:

I.

That as appears from the libel, this is an action brought by libelant in rem against the Schooner Holmes to recover damages in the sum of fourteen thousand (\$14,000.00) dollars, for personal injuries sustained at sea by being struck on the arm with the end of a tow-line which he was casting off the schooner, by reason, as alleged in the libel, of the Captain negligently failing to insist upon giving libelant assistance, and for damages alleged to have been sustained through improper treatment of such

injuries by a physician at Port Angeles, to which port the Captain put back to obtain medical and surgical attendance for libelant; that said cause of action is not a maritime cause of action, enforceable in a proceeding in rem, and is not within the jurisdiction of this Honorable Court.

II.

That this action, instituted by a seaman in rem against a vessel to recover damages for personal injuries sustained by him aboard a seaworthy vessel at sea is not an admiralty and maritime cause of action and is not within the jurisdiction of this Honorable Court.

III.

That this action, instituted by a seaman in rem against a vessel to recover damages for improper treatment of personal injuries sustained by him at sea, by a physician at a port to which the vessel put to obtain medical and surgical attendance for him, is not an admiralty and maritime cause of action, and is not within the jurisdiction of this Honorable Court.

IV.

That libelant has no cause of action against the vessel for damages alleged to have resulted from

improper treatment of personal injuries sustained as alleged in the libel, by a physician at a port to which the vessel put back to obtain medical and surgical attendance for him, as alleged in the libel.

Wherefore, Claimant prays that the libel may be hence dismissed.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Claimant.

Copy of within Exceptions received and due service thereof acknowledged this 22d day of September, 1913.

DAN LANDON,
Attorney for Libelant.

Indorsed: Exceptions to Libel. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 22, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*United States District Court. Western District of
Washington. Northern Division.*

GUST FONDAHN,	Libelant, } No. 2539. Filed Dec. , 1913 Respondent.
<i>vs.</i>	
SCHOONER "C. S. HOLMES," her tackle, apparel and furniture,	

Daniel Landon, for Libelant.

Ballinger, Battle, Hulbert & Shorts, for Claim-
ant.

NETERER, District Judge.

The Libelant seeks damages for personal injuries sustained on board the Schooner "C. S. Holmes," and for negligence of the master in furnishing medical treatment thereafter. The libel alleges that in December, 1912, libelant signed articles as an able seaman for a voyage from San Francisco, California, to Everett, Washington, and return, and that:

"While on said voyage * * * on the 3rd day of January, 1913, at about the hour of eight o'clock in the afternoon while the said schooner was being towed near Cape Flattery, the Cap-

tain of said schooner gave orders for the libelant to go forward and let go the tow line or sprig; that in pursuance of said order the libelant went forward and commenced to release the wire tow line or sprig reaching from said schooner to the tug boat in the presence of the Captain and the rest of the crew; that in order to release the same it became necessary for the libelant to have assistance; that the Captain, with the rest of the crew standing near by, negligently failed to insist upon giving libelant assistance; that libelant alone was unable to prevent said tow line or sprig from springing, and the end of the same struck libelant with great force and violence, causing a compound fracture of the right arm and injuring his back."

Then follows the allegations of negligence in the furnishing of medical treatment, which will be discussed later.

The Claimant filed exceptions to the libel, the second paragraph of which reads as follows

"That this action, instituted by a seaman in rem against a vessel to recover damages for personal injuries sustained by him aboard a seaworthy vessel at sea is not an admiralty and maritime cause of action, and is not within the jurisdiction of this Honorable Court."

It will be seen that the negligence alleged is that "the Captain with the rest of the crew negligently failed to insist upon giving libelant assist-

ance." The issue raised by the exception is whether for such negligence the vessel is liable.

The members of the crew, "except perhaps the master," must be considered fellow servants.

The Osceola, 189 U. S. 158.

Is the master a fellow servant of the other members of the crew?

"To put it most favorably for the libelant, the question was reserved in the *Osceola*, 189, U. S. 158."

The Bunker Hill, 198 Fed. 587.

In the *Governor Ames*, 56 Fed. 327, Judge Hanford held that there could be no recovery for the negligence of the officers of a vessel, where the owner had furnished proper equipment, and a sufficient crew, and many authorities may be cited in support of such a holding.

25 Am. & Eng. Enc. of Law;

The City of Alexandria, 17 Fed. 390.

The Bunker Hill, 198, Fed. 587.

The true rule is that stated by Judge Ross in *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, 576 (C. C. A.):

"It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to

seamen, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury and sickness, and for his neglect in any of those particulars the owner is liable."

In that case the owner was held not liable for the negligence of the master in leaving the hatch open, on the ground "that it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were engaged."

In this case the negligence being predicated upon the fact that the captain and the rest of the crew were standing near by and negligently failed to insist upon giving libellant assistance, it must be conceded for the purposes of the allegation that the owners had furnished a sufficient crew. Having furnished such a crew, were the owners bound to see, as various exigencies arose in the navigation of the ship requiring that assistance be given to one of the members of the crew, that the other members should go to his aid? To do so would make each member of the crew the personal representative of the owner, and overthrow every decision that has ever been written on the question. It not being the duty of the owner to see that such assistance

was given libelant, the master cannot be said to have been the representative of the owner with respect to such duty, and for his negligence in such respect the vessel cannot be proceeded against in rem.

The allegations of the complaint in reference to negligence in furnishing medical treatment are as follows:

“that at the time libelant was injured as aforesaid the Captain of said schooner ordered the same to turn back to Port Angeles at which port she arrived at three o'clock the next morning; that before landing at Port Angeles, this libelant requested the captain to be taken to Port Townsend; that said Captain informed libelant that it would be too much expense to said schooner and that a marine doctor was located at Port Angeles; that after visiting some four hours at Port Angeles on board of said ship, libelant, against his wish, was taken ashore where the captain took him to a private doctor and represented to said doctor that he would be paid for his services through the marine hospital; that said doctor took charge of the case and immediately thereafter the Captain of said schooner informed the doctor that he, the libelant, was in the doctor's hands and off his own; that about eleven o'clock of that same forenoon, this libelant was chloroformed by the doctor and an attempt was made to set the bones broken; that by reason of the carelessness and negligence of the Captain of said ship

in turning this libelant, against his desire, over to an inexperienced, incompetent, and unwilling doctor, the work was done in an unskillful and wholly improper manner.

“That after remaining at Port Angeles three days the said doctor requested this libelant to put on his clothes, informing him that the representations, made by the Captain to the doctor, regarding his pay, were false and he had better go to Port Townsend to the marine hospital; that libelant was unable to move or be moved and after remaining there several days longer without proper attention he finally went to Port Townsend to the marine hospital; that at the time of arriving at Port Townsend, through the negligence and incompetency of said doctor at Port Angeles, the libelant’s arm had become swollen and sore and he was threatened with blood poison; that it was thought impossible by the doctor in charge at said marine hospital to set said bones before treatment was had to reduce the soreness and swelling; that after several days an attempt was made by the physicians and surgeons in said marine hospital at Port Townsend to set the bones, but owing to the fact that the ends had become infected and lost their power to knit, the work was unsuccessful and as a result of the treatment received as aforesaid the bones so broken will never knit together, but will be a source of annoyance, pain and suffering to libelant, and said arm will always be entirely useless; that during all the times herein mentioned the libelant has suffered excruciating pain, humiliation and inconvenience, at times despairing of his life.”

The fourth paragraph of the exceptions is as follows

“That libelant has no cause of action against the vessel for damages alleged to have resulted from improper treatment of personal injuries sustained as alleged in the libel, by a physician at a port to which the vessel put back to obtain medical and surgical attendance for him, as alleged in the libel.”

It is the duty of the owner to furnish an injured seaman with proper medical care, and the master represents the owner with respect to this duty, and the owner is liable for the negligence of the master in that regard.

The Iroquois, 194 U. S. 241;

The Osceola, 189 U. S. 158;

The Fullerton, 167 Fed. 1;

The Sarnia, 137 Fed. 952;

The Troop, 118 Fed. 789;

Id. 128 Fed. 837 (C. C. A.);

The Scotland, 42 Fed. 925;

The M. E. Luckenbach, 174 Fed. 264.

Where the master employs a physician, is the owner liable in all events for the negligence of that physician, or is he liable only where the master fails to exercise reasonable care in selecting the physician? No case in admiralty which decides that question has been found; it must be determined upon reason and

analogy, having regard to the nature and character of the duty imposed.

The duty of an owner to select a competent physician is analogous to the duty of an employer to select competent fellow servants; both are duties imposed by law. It is well settled that the master is held only to the exercise of ordinary and reasonable care in the employment of a fellow servant, and is not an insurer of the competency of such servant.

26 Cyc. 1295.

The owner's duty is also analogous to the duty of an employer to furnish medical attendance in extraordinary cases when it is imperatively demanded or to that of one who collects fees from his employees and undertakes to furnish medical treatment, without making a profit therefrom.

“The master who conducts a hospital for the use of his injured employees, not for the purpose of gain but for charitable purposes merely, is not liable to a servant for injuries caused by the negligence of the physicians or attendants, unless reasonable care was not used in their selection. This is true although the expenses of running the hospital are provided for out of moneys retained from the monthly wages of a company's employees, there being, however, no intention on the part of the company to make any profit. But where in consideration of a reduction in the rate of wages of

all the men employed, and the consequent profit to be made by the company, the latter binds itself to furnish medical treatment to such of them as may get hurt or become sick while in its service, the company should bear the loss of improper treatment, since the law implies in such cases an undertaking to give proper treatment."

20 Am. & Eng. Encyc. of Law, 54.

"It is well settled that a master has performed his entire duty in respect to furnishing medical attention to a servant injured while at work, when he employs a person of ordinary competency and skill in the profession; and, having done so, he cannot be made liable for the carelessness of his duties. So, too, where a hospital is maintained by a master for the sole purpose of relieving injured servants, without any intention of profit to himself, he is not liable to his servants for the malpractice of the physician employed, if ordinary care was exercised in selecting him, although the hospital is supported by the contributions of the servants."

26 Cyr. 1082.

The owner's duty cannot be analogous to the obligation of the employer who makes a profit in furnishing medical attendance, for the shipowner makes no profit, and is not required to keep a physician on board the vessel. The duty is one which arises out of or is governed by the circum-

stances of each particular case, and it is only for the negligence of the owner himself, or the owner's representatives, the master, that the vessel can be held. The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and entrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment.

The libel does not allege that the master knew of the incompetency of the physician, or that he should have known of such incompetency and failed to exercise reasonable diligence in selecting him. The libel alleges that the master represented to the doctor that he would be paid for his services through the marine hospital, and that three days thereafter the doctor informed libelant that the master's representations were false. There is no allegation that these representations were untrue, or that the doctor manifested any unwillingness to the master to accept such terms of employment; nor are the doctor's statements binding upon the master of the vessel. The libel also alleges that the master took libelant to Port Angeles to a private doctor when libelant had requested to be taken to Port Townsend to the marine hospital. This cannot of itself constitute negligence, since it is manifest that an in-

jured seaman cannot in every instance have the choice of physicians, regardless of expediency or expense. The master's duty to the owner requires that he should take such matters into consideration, and while the humane duty to the seaman should have the greater weight, the master cannot be said to be negligent when he exercises reasonable diligence in employing a physician whom he believes to be competent to attend to the seaman's injuries. For all that appears in the libel the master may have believed that the libelant would receive treatment as much calculated to effect a cure from the physician in question as from the marine hospital. Where there is no negligence of the master, the physician's negligence cannot be imputed to him or to the owner, and the vessel cannot be proceeded against in rem.

The owner is liable for the expenses of effecting the cure of a seaman injured in his employ, so far as a cure is possible by ordinary medical means, and this liability exists even where the owner has not been negligent, and may be enforced in rem, and is not relieved by the negligence of the seaman, provided he has not been grossly negligent.

The Osceola, 189 U. S. 158;

The New York, 204 Fed. 764;

The City of Alexandria, 17 Fed. 390.

But the libelant is not seeking to enforce this liability by asking the recovery of expenses necessarily incurred or to be incurred in effecting a cure; there is no allegation in the libel which can be so construed. The third paragraph of the libel reads as follows

“That he was prior to said injuries an able-bodied, healthy person of the age of forty-five years, capable of and was earning the sum of \$45.00 per month and subsistence; that libelant will be to great expense in securing medical and surgical treatment for a long time to come. That ever since said injuries he has been and is now wholly incapacitated and, as he believes, will ever be so; that by reason of the matters set forth herein, libelant has been damaged by the respondent in the sum of fourteen thousand dollars.”

It is manifest that the allegation “that libelant will be to great expense in securing medical and surgical treatment for a long time to come,” is set forth merely as an element of the damages caused by the negligence of the physician, and such prospective expenses are sought to be recovered on that theory alone. The liability of the owner to pay for medical treatment, and his liability to pay damages, of which medical treatment is an element, are two different things. The first liability exists from the fact of injury, the second arises only where the owner is

at fault either in causing the injury or its treatment. Even conceding that the owner is liable for expenses to be incurred, there is no allegation which bring libelant within such theory. The liability of the owner is only for expenses in affecting a cure so far as possible, by ordinary medical means; and this does not include extraordinary medical treatment, or treatment which extends after a cure has been as nearly affected as is possible in a particular case.

The Kenilworth, 144 Fed. 376;

The Nyack, 199 Fed. 383.

The exceptions are sustained.

JEREMIAH NETERER,
Judge.

Indorsed: Exceptions to libel sustained. Filed in the United States District Court, Western District of Washington, Dec. 31, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States District Court for the Western
District of Washington. Northern
Division. In Admiralty.*

GUST FONDAHN,	Libelant,	} No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,		
	Respondent.	

AMENDED LIBEL.

To the Honorable Judges of the Above Entitled
Court:

The amended libel of Gust Fondahn, of Port Townsend, Washington, late seaman of the American Schooner C. S. Holmes, whereof Harry Thompson, now is or late was master, against the said ship, her tackle, engines, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause for damages for personal injuries and wages, civil and maritime, sheweth:

I.

That during the month of December, 1912, the libelant signed articles as an able seaman to make a trip on board the Schooner C. S. Holmes from

San Francisco, California, to Everett, Washington, and return, at forty-five dollars per month.

II.

That while on the return voyage and while performing his duty as a seaman, on the third of January, 1913, in the afternoon a heavy storm arose and the ship sought shelter in Neah Bay. A tug was sent out to look at the condition of the weather, and came back and reported that it was not fit for any vessel to go out on account of the mountain of sea running at twelve o'clock noon. With the weather conditions unchanged the Steamer Goliah gave the said "C. S. Holmes" a steel cable of five inches thickness, which was taken on board and made fast on the forward end of the said ship by being placed three times around a square bit; and by order of the Captain of the said ship "C. S. Holmes" the steamer Goliah towed her to sea, it taking the steamer seven hours to tow the "C. S. Holmes" a distance of eight miles.

III.

That at about seven o'clock and while weather conditions were unchanged the said steamer blew her whistle to let go the wire; the captain of the "Holmes" gave general orders for everybody to go forward and take hold of the wire; the crew held

back; when they received the orders the second time everybody went forward, but none went to the wire except the libelant; the Captain was standing about four feet above the libelant where he could see everything going on, libelant being in a position where he could not see the condition of the wire; libelant inquired of the Captain how the wire was on the bow, and he was told by the Captain that the wire was slack and that everything was all right and to let go; and libelant let go the lashings and went away as quickly as possible to avoid danger. The wire was tight and sprang back and hit libelant, causing compound fracture of libelant's right arm, paralyzing and bruising his side.

IV.

That the Captain gave orders to go back to Port Angeles; libelant requested to be taken to Port Townsend to the marine hospital, but was informed that it would cost \$100 to do so, and that there was a marine doctor at Port Angeles, and so refused; they arrived at Port Angeles at three o'clock in the morning; the libelant again requested to be taken to Port Townsend to the marine hospital, and the Captain again refused; at about seven or eight o'clock the Captain took libelant to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was

good for all expenses incurred; the said doctor asked the Captain to explain the permit; the Captain then told him, "I have nothing to explain; the man is in your care now and he is out of my hands," at the same time laughing at the doctor in a manner that would indicate that he had knowingly deceived him. The Captain knew all the time that there was no marine doctor at Port Angeles, and that the permit was valueless for any purpose other than to be used for admission at the Port Townsend marine hospital. The Captain deliberately put libelant off at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief, at the same time he knew or should have known that libelant needed prompt and permanent attention on account of the condition of his injuries.

V.

That the libelant was taken to the office of the doctor and in the presence of the Captain an attempt was made by the then unwilling doctor to fix him up temporarily, which was not successful, and two days later while libelant was still in a helpless condition the doctor requested the libelant to leave; libellant was unable to move; he received no more attention or treatment for six days longer, when with considerable effort he made his way to

Port Townsend; during the time he was at Port Townsend blood poison set in, and after two months' treatment at the marine hospital at Port Townsend an attempt was made to set the bones, but the ends of the bones so broken had commenced to decay by reason of treatment being neglected when injured and the arm was in such condition that the plates used to hold the bones together broke loose and the bones are still continuing to decay.

VI.

That by reason of the treatment being delayed as aforesaid the bones will never knit together, but will continue to be a source of great annoyance, pain and suffering to the libelant; that during all the times herein mentioned the libelant has suffered excruciating pain, humiliation and inconvenience, at times despairing of his life.

VII.

That prior to said injuries libelant was an able-bodied man of the age of forty-five years, capable of and was earning the sum of forty-five dollars and subsistence; that libelant will be put to great expense in securing medical and surgical treatment during his entire life; that ever since said injuries he has been and now is wholly incapacitated and he believes will ever be so.

VIII.

That libelant has paid the sum of thirty dollars to said doctor at Port Townsend for the services so received.

IX.

That libelant was paid his wages up to the time he was injured; that he is entitled under the circumstances herein set out to one month's pay in addition to said sum.

X.

That by reason of the injuries received as aforesaid the libelant is damaged in the sum of \$4000.

That by reason of the failure of respondent to provide libelant proper medical and surgical treatment he is damaged in the sum of \$10,000.

That libelant is entitled to the return of the \$30 paid by him for medical treatment.

That he is further entitled to \$45 for wages.

XI.

That the vessel was at the time this libel issued lying at Winslow, in the waters of Puget Sound in Kitsap County, Washington.

XII.

That all and singular the said premises are

true and within the admiralty and maritime jurisprudence of the United States and this honorable Court.

Wherefore this libelant prays that process issue in due form of law according to the course of this honorable Court in causes of admiralty and maritime jurisprudence against the said schooner that the said ship may be condemned and sold, and that the Court be pleased to grant to this libelant such other and further relief as in law and justice he may be entitled to.

DANIEL LANDON,
Proctor for Libelant.

STATE OF WASHINGTON, }
County of King } ss.

Gust Fondahn, being first duly sworn, on oath says that he is the libellant in the above entitled action; that he has read the foregoing amended libel, knows the contents thereof and believes the same to be true.

GUST FONDAHN.

Subscribed and sworn to before me this 7th day of January, 1914.

(Seal.) DANIEL LANDON,
Notary Public for the State of Washington, residing at Seattle.

Service of the amended libel by delivery of a copy to the undersigned is hereby acknowledged this 9th day of January, 1914.

BALLINGER, BATTLE, HULBERT & SHORTS.

Indorsed: Amended Libel. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 12, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the District Court of the United States for the
Western District of Washington. Northern
Division.*

GUST FONDAHN,	} Libelant,	No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her tackle, apparel and furniture,		
Respondent.		

**EXCEPTIONS OF GEORGE E. BILLINGS, THE CLAIMANT,
AS AGENT FOR AND ON BEHALF OF THE OWNERS
OF THE SCHOONER "C. S. HOLMES," TO THE
AMENDED LIBEL OF GUST FONDAHN AGAINST
SAID SCHOONER.**

To the Honorable Jeremiah E. Neterer, Judge of
the Above Entitled Court:

Comes now the said claimant, by his proctors
of record, and excepts to the said amended libel:

I.

For the reason that said libel purports to set forth several causes of action, but that the said several causes are not segregated or separately stated, or stated in such manner that claimant can answer or except to the same distinctly and separately.

If the Court denies the foregoing exception, and holds that said amended libel sets forth in such manner that claimant can answer or except to the same distinctly and separately four purported causes of action, as follows, to-wit:

(1) An action *in rem* by libelant, a seaman, to recover damages for personal injuries sustained by him at sea, aboard a seaworthy vessel;

(2) An action *in rem* by libelant, a seaman, to recover damages for an alleged breach of the owner's duty, under the maritime law, to furnish the seaman injured aboard a seaworthy vessel at sea, with proper medical care;

(3) An action *in rem* by libelant, a seaman, to recover wages;

(4) An action *in rem* by libelant, a seaman, to recover money paid by him for medical treatment of personal injuries sustained by him aboard a seaworthy vessel at sea;

Then claimant excepts

II.

To all such allegations in said amended libel as are allegations of facts purporting to constitute such first purported cause of action, for the reason that such a cause is not an admiralty and maritime cause of action, and is not within the jurisdiction of this Honorable Court, and for the reason that said amended libel does not allege facts sufficient to constitute such cause of action.

III.

To all such allegations in said amended libel as are allegations of facts purporting to constitute such second purported cause of action, on the ground that such amended libel does not allege facts sufficient to constitute such a cause of action.

IV.

To all such allegations in said amended libel as are allegations purporting to constitute such third purported cause of action, for the reason that said amended libel does not allege facts sufficient to constitute such a cause of action.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Claimant.

Copy of within Exceptions received and due service thereof acknowledged this 10th day of January, 1914.

DANIEL LANDON,
Attorney for Libelant.

Indorsed: Exceptions to Amended Libel. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 10, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*United States District Court, Western District of
Washington. Northern Division.*

GUST FONDAHN,) Libelant.	No. 2539.
vs.		
SCHOONER "C. S. HOLMES," her tackle, apparel and furniture,		
Respondent.		

Filed Feb. , 1914

**ON EXCEPTIONS TO AMENDED LIBEL. EXCEPTIONS
TO FIRST AND SECOND CAUSES OF ACTION SUS-
TAINED.**

Daniel Landon, for Libelant.

Ballinger, Battle, Hurlbert & Shorts, for Claim-
ant.

NETERER, District Judge.

This is an action in rem in which libelant seeks recovery of damages for personal injuries, damages for negligence in furnishing medical treatment, expenses of medical treatment, and wages. The matter was heretofore considered by the court upon exceptions to the libel, which were sustained, 208 Fed.—An amended libel has been filed, and the matter is now before the court on the claimant's exceptions to the amended libel.

The amended libel, after alleging the employment of libelant as a seaman on board the "C. S. Holmes," recites:

"That while on the return voyage and while performing his duty as a seaman, on the third of January, 1913, in the afternoon, a heavy storm arose and the ship sought shelter in Neah Bay. A tug was sent out to look at the condition of the weather, and came back and reported that it was not fit for any vessel to go out on account of the mountain of sea running at twelve o'clock noon. With the weather conditions unchanged the Steamer Goliah gave the said "C. S. Holmes" a steel cable of five inches thickness which was taken on board and made fast on the forward end of the said ship by being placed three times around a square bit; and by order of the captain of the said ship "C. S. Holmes," the steamer Goliah towed her to sea, it taking the steamer seven hours to tow the "C. S. Holmes" a distance of eight miles."

“That at about seven o'clock and while weather conditions were unchanged the said steamer blew her whistle to let go the wire; the Captain of the “Holmes” gave general orders for everybody to go forward and take hold of the wire; the crew held back; when they received the orders the second time everybody went forward, but none went to the wire except the libelant; the Captain standing about four feet above the libelant where he could see everything going on; libelant being in a position where he could not see the condition of the wire, libelant inquired of the Captain how the wire was on the bow, and he was told by the Captain that the wire was slack and that everything was all right and to let go; and libelant let go the lashings and went away as quickly as possible to avoid danger. The wire was tight and sprang back and hit libelant, causing a compound fracture of libelant's right arm, paralyzing and bruising his side.”

To the cause of action above alleged the claimant excepts as follows:

“Claimant excepts to all such allegations in said amended libel as are allegations of facts purporting to constitute such first purported cause of action, for the reason that such a cause is not an admiralty and maritime cause of action, and is not within the jurisdiction of this honorable court, and for the reason that said amended libel does not allege facts sufficient to constitute such cause of action.”

By reference to the former opinion, it will be seen that the negligence upon which the libelant there relied was "that the Captain with the rest of the crew standing near by negligently failed to insist upon giving libelant assistance." The negligence here relied upon is that "libelant inquired of the Captain how the wire was on the bow, and he was told by the Captain that the wire was slack and that everything was all right and to let go; and libelant let go * * * The wire was tight and sprang back and hit libelant."

The former ground of negligence was held insufficient to charge the owners or the vessel under the rule laid down by the Circuit Court of Appeals of the Ninth Circuit in *Olson v. Oregon Coal & Nav. Co.*, 104 Fed. 574. The question now to be determined is whether the latter ground of negligence is sufficient to charge the vessel.

Libelant relies upon *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415. The negligence there charged, however, was an unsafe appliance for towing, which might be sufficient to bring the case within the rule laid down in the *Olson* case, *supra*. The defendant nevertheless contended that plaintiff might have been ordered to do the work in a safe manner, and the failure of the mate to order him to do it in such a manner was negligence of the

mate in a detail of navigation, for which the owner would not be liable, citing *Quinn v. New Jersey Lighterage Co.*, 23 Fed. 363; *The Queen*, 40 Fed. 694. The court meets this contention with the general statement that the mate and Captain are not fellow servants of an ordinary seaman, and cites *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377, and *The Transfer No. 4* and *the Car Float No. 16*, 61 Fed. 364.

Libelant contends that the holding of the state Court should govern. Jurisdiction in admiralty cases being exclusively vested in the United States District Court by Art. 3, Sec. 2, of the Constitution, and Secs. 24 and 256 of the Judicial Code, this contention cannot be sustained. It was expressly so held in *Workman v. New York City*, 179 U. S. 552. In the absence of a holding of the Supreme Court of the United States, this court must be governed by the holdings of the Circuit Court of Appeals for the Ninth Circuit.

Quinn v. New Jersey Lighterage Co., and *The Queen*, *supra*, were both considered and approved in the Olson case. Each state that the rule in *Chicago, etc., Railway Co. v. Ross* does not operate to charge the owner with negligence in respect to the details of navigation. Not only is this so, but *The Transfer, etc.*, 61 Fed. 364, which the Wash-

ington Supreme Court cites in support of its holding, is based expressly upon *Chicago, etc., Ry. Co. v. Ross*, *supra*, which was overruled by the Supreme Court in the case of *New England Railroad Co. v. Conroy*, 175 U. S. 323. Referring to this case, Judge Ross, in the *Olson* case, *supra*, at page 576, says:

“In the recent case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, where the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, was finally and squarely overruled, the Supreme Court announces the true rule to be, both upon principle and authority, ‘That the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end.’”

The negligence here complained of was in a mere detail in the navigation of the ship; it was not with respect to any duty which the owner personally owed to the libellant. For such negligence

of any member of the crew, whether seaman or Captain, the owner is not liable, and the vessel cannot be proceeded against in rem.

Olson v. Oregon Coal & Nav. Co., 104 Fed. 574;

The Queen, 40 Fed. 694;

Quinn v. Lighterage Co., 23 Fed. 363;

The Governor Ames, 55 Fed. 327;

The Bunker Hill, 198 Fed. 587.

The City of Alexandria, 17 Fed. 390;

The C. S. Holmes, filed Dec. 31, 1913, 208 Fed. —.

The libel further alleges:

“That the Captain gave orders to go back to Port Angeles; libelant requested to be taken to Port Townsend to the marine hospital, but was informed that it would cost \$100 to do so, and that there was a marine doctor at Port Angeles and so refused; they arrived at Port Angeles at three o'clock in the morning; the libelant again requested to be taken to Port Townsend to the marine hospital and the captain took libelant to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was good for all expenses incurred; the said doctor asked the Captain to explain the permit; the Captain then told him, ‘I have nothing to explain; the man is in your care now and he is out of my hands,’ at the same time laughing at the doctor in a manner which would indicate that he had know-

ingly deceived him. The Captain knew all the time that there was no marine doctor at Port Angeles, and that the permit was valueless for any purpose other than to be used for admission at the Port Townsend marine hospital. The Captain deliberately put libelant off at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief; at the same time he knew or should have known that libelant needed prompt and permanent attention on account of the condition of his injuries."

"That the libelant was taken to the office of the doctor and in the presence of the Captain an attempt was made by the then unwilling doctor to fix him up temporarily, which was not successful, and two days later while libelant was still in a helpless condition the doctor requested the libelant to leave; libelant was unable to move; he received no more attention or treatment for six days longer, when with considerable of effort he made his way to Port Townsend; during the time he was at Port Angeles blood poison set in, and after two months treatment at the marine hospital at Port Townsend an attempt was made to set the bones, but the ends of the bones so broken had commenced to decay by reason of treatment being neglected when injured and the arm was in such condition that the plates used to hold the bones together broke loose and the bones are still continuing to decay."

Claimant excepts to the above cause of action, as follows:

“To all such allegations in said amended libel as are allegations of facts purporting to constitute such second purported cause of action, on the ground that such amended libel does not allege facts sufficient to constitute such a cause of action.”

In the former opinion in this case it was held that the owner is liable for the negligence of a physician employed by the Captain only when the master is negligent in employing him. The duty was there held analagous to that of selecting a competent fellow servant, where the master is held liable only when he knew or should have known of the incompetency of the fellow servant.

26 Cyc. 1295; 1298.

It was stated that the mere act of not going to Port Townsend to take libelant to the marine hospital would not be negligence. The question then remains whether in the employment of this particular physician there was such negligence as to charge the owner. It is nowhere alleged that the master knew of the physician's incompetence, nor are any facts alleged sufficient to charge him with knowledge. It is alleged that the master gave the physician a permit to the marine hospital, telling him that it was good for all expenses, when the Captain knew that it was valueless for any other

purpose than admission to the hospital. It is then alleged that "in the presence of the Captain an attempt was made by the then *unwilling* doctor to fix him up temporarily." Only by the most liberal inference can the missing links between the representations of the master and the malpractice be supplied. It can be only by reading into the libel allegations that the *unwillingness* caused the malpractice, and that the unwillingness was caused by the falsity of the representations. The word "unwilling," as applied to the doctor, expresses a conclusion as to a state of mind, and no words or acts of the doctor are alleged which manifested to the master such a state of mind. It is evident that the physician accepted the employment and undertook to minister to libellant. Even had he done so gratuitously, there rested upon him "the same degree of care and skill and the same measure of duty" as would have rested upon him had he received compensation.

22 Am. & Eng. Enc. Law, 801.

Here he had not only the liability of his patient, but that of the owners and the vessel as well, upon which to rely.

The Osceola, 189 U. S. 158.

The New York, 204 Fed. 764;

The City of Alexandria, 17 Fed. 390.

A misrepresentation as to the method of payment, under such circumstances, cannot be reasonably anticipated to result in malpractice. It is not such negligence or fault as will charge the vessel. The other allegations are merely of conclusions, from which no implication of negligence is necessarily drawn, and are to be disregarded.

Strauss v. Fox, 34 S. C. R. 42;

Jackson v. Chicago, Mil. & St. Paul Ry., filed in this Court Feb. 2, 1914.

The claimant admits that libelant is entitled to the \$30 alleged to have been paid for medical treatment, provided he can prove he has paid such sum; and that he is entitled to wages to the end of his voyage, if he can prove that he has not been paid the same.

The exceptions to the first and second causes of action are sustained.

JEREMIAH NETERER,

Judge.

Indorsed: On exceptions to amended libel. Exceptions to first and second cause of action sustained. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 13, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES," her

tackle, apparel and furniture,

Respondent.

No. 2539.

FINAL ORDER.

This matter coming on regularly to be heard upon the exceptions of Claimant herein to the amended libel, the Court having heretofore rendered its decision.

It is ordered that Claimant's exceptions to the first and second causes of actions be sustained.

That all other exceptions are overruled.

Libelant excepts to the Court's ruling on said exceptions sustained, which exceptions are allowed.

Done in open Court this 21st day of February, 1914.

JEREMIAH NETERER,

Judge.

Service of the within Order by delivery of a copy to the undersigned is hereby acknowledged this 19th day of February, 1914.

BALLINGER, BATTLE, HULBERT & SHORTS.

Proctors for Claimant.

Indorsed: Final Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 21, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.
In Admiralty.*

GUST FONDAHN,	} Libelant,	No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture, Respondent.		

NOTICE OF APPEAL.

Sirs: Take notice that the libelant above named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree, entered herein February 21, 1914.

Yours respectfully,

DANIEL LANDON,

Proctor for Libelant and Appelant.

To Ballinger, Battle, Hulbert & Shorts,

Proctors for Respondent and Appellee.

FRANK L. CROSBY,

(Seal) Clerk of the United States District Court
for the Western District of Wash-
ington; Northern Division. In Admiralty.

Service of the within Notice of Appeal by delivery of a copy to the undersigned is hereby acknowledged this 19th day of Feb., 1914.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Claimant.

Indorsed: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 21, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.
In Admiralty.*

GUST FONDAHN,	} Libelant,	No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,		
Respondent.		

PETITION ON APPEAL, WITH ALLOWANCE INDORSED.

To the Honorable Jeremiah Neterer, the above named Libelant conceiving himself aggrieved by the order and decree made and entered by the above named Court wherein and whereby among other things, it was and is ordered that claimant's exceptions to the first and second causes of action stated in the amended libel herein be sustained, the said libelant does hereby appeal from said order, and prays that libelant's petition for his said appeal be allowed and that a transcript of the record, proceedings and papers namely: the libel, exceptions to the libel, the Court's opinion on exceptions to the libel, the amended libel, the exceptions to the amended libel, and the Court's opinion on the exceptions to the amended libel, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DANIEL LANDON,
Proctor for Libelant.

ORDER.

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Dated Feb. 21, 1914.

JEREMIAH NETERER,

Judge.

Service of the within Petition on Appeal by delivery of a copy to the undersigned is hereby acknowledged this 20th day of Feb., 1914.

BALLINGER, BATTLE, HULBERT & SHORTS,
Attorneys for Claimant.

Indorsed: Petition on Appeal with Allowance
Indorsed: Filed in the U. S. District Court,
Western District of Washington, Northern Division,
Feb. 21, 1914. Frank L. Crosby, Clerk. By Ed. M.
Lakin, Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.*

GUST FONDAHN,	} Libelant,	No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,		
	Respondent.	

ASSIGNMENT OF ERROR IN ADMIRALTY.

First, the Court erred in sustaining claimant's exceptions to libelant's first cause of action as set forth in his amended libel.

Second, that the Court erred in sustaining claimant's exceptions to libelant's second cause of action as set forth in his amended action.

DANIEL LANDON,
Proctor for Libelant.

Service of the within Assignment of Error by delivery of a copy to the undersigned is hereby acknowledged this 20th day of Feb., 1914.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Claimant.

Indorsed: Assignment of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 21, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.*

GUST FONDAHN,	} Libelant,	No. 2539.
vs.		
SCHOONER "C. S. HOLMES," her tackle, apparel and furniture,		
Respondent.		

COST BOND ON APPEAL.

Know All Men by These Presents, That we, Gust Fondahn, Libelant in the above entitled action, as principal, and the Kansas City Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and authorized to transact business as surety in the State of Washington, as surety, are held and firmly bound unto the Schooner "C. S. Holmes," in the sum of two hundred fifty (\$250.00) dollars, lawful money of the United States, to be paid to the said Schooner "C. S. Holmes," for the payment of which sum well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of February, A. D. 1914.

Whereas, the above bounden Principal, Gust Fondahn, as Appellant, has prosecuted an appeal

to the United States Circuit of the United States, bearing date of 21st day of Feb., 1914, in a suit wherein Gust Fondahn is Libelant against the Schooner "C. S. Holmes," her tackle, apparel, etc.

Now, therefore, the condition of this obligation is such that if the above named appellant, Gust Fondahn, shall prosecute said appeal with effect, and pay all costs which may be awarded against him, as such appellant, if the appeal is not sustained, then this obligation shall be null and void; otherwise to remain in full force and effect.

In testimony whereof, witness our hands and seals the day and year first above written.

GUST FONDAHN, Principal.

(Seal) THE KANSAS CITY CASUALTY
COMPANY, by H. E. Orr Com-
pany, Inc., Its Attorney-in-fact.

By H. E. ORR, President. (Seal)

Attest: Geo. W. Farlin, Secretary.

The above bond approved this 21st day of February, A. D. 1914.

JEREMIAH NETERER,
Judge.

Indorsed: Cost bond on appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 21, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.
In Admiralty.*

GUST FONDAHN,) Libelant,	No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,		
Respondent.)	

STIPULATION.

It is hereby stipulated by and between the proctors for libelant and respondent that the record on appeal shall contain only the libel and amended libel, the claimant's exceptions to the libel and amended libel, the Court's opinions on the exceptions to the libel and intervening libel, Final Order, Notice of Appeal, Petition on Appeal with allowance indorsed, Assignment of Error and Cost Bond on Appeal.

DANIEL LANDON,
Proctor for Libelant.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Respondent.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 21, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In The District Court of the United States for the
Western District of Washington.
Northern Division.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES," her

tackle, apparel and furniture,

Respondent.

No. 2539.

ORDER.

It appearing to the Court herein that the libelant has heretofore, to-wit, on the 21st day of February, 1914, served and filed his Notice of Appeal to the Circuit Court of Appeals, for Ninth Circuit, that the printed record is not completed and that it will take some time to finish same, and for good cause being shown, it is hereby ordered that the libelant have thirty days' extension to complete same.

Done in open Court this 24th day of March, 1914.

JEREMIAH NETERER,

Judge.

O. K.—Ballinger, Battle, Hulbert & Shorts,

Proctors for Respondent.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, March 24, 1914. Frank L. Crosby, Clerk.
By E. M. L., *Deputy.

*In The United States District Court for the Western
District of Washington. Northern Division.*

GUST FONDAHN,	Libelant,	} No. 2539.
vs.		
SCHOONER "C. S. HOLMES," her		
tackle, apparel and furniture,		
	Respondent.	

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,	} ss.
Western District of Washington.	

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 57 printed pages, numbered from 1 to 57 inclusive, to be a full, true, correct and complete copy of so much of the record and proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the Final Order of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the libelant for the preparation, printing and certification of the printed Transcript of Record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905,) for making transcript of the record for printing purposes—102 folios at 30 cents per folio	\$30.60
Certificate of Clerk to Transcript of record— 3 folios90
Seal to said certificate40

STATEMENT OF COST OF PRINTING SAID TRANSCRIPT OF RECORD.

Printer's fee (Sec. 1, Act of February 13, 1911)	\$75.00
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I hereby certify that the above cost for preparing, certifying and printing above record, amounting to \$106.90, has been paid to me by Daniel Landon, Esq., Proctor for Libelant.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 1st day of April, 1914.

(Seal)

FRANK L. CROSBY, Clerk.

